Supreme Court, U.S.
FILED
SEP 22 1992
OFFICE OF THE CLERK

92-528
No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

PAUL T. CAPPUCCIO
Associate Deputy Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
PETER R. MAIER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether aliens outside the United States have rights under the Due Process Clause of the Fifth Amendment in connection with their attempts to enter the United States.

2. Whether the respondent Haitian interdictees' claim of such a due process right is barred under collateral estoppel principles by the class action judgment of the district court in *Haitian Refugee Center, Inc.* v. *Baker*, 953 F.2d 1498 (11th Cir.), cert. denied, 112 S. Ct. 1245 (1992), which held that interdictees outside the United States have no rights under the Due Process Clause.

PARTIES TO THE PROCEEDINGS

The petitioners are Lawrence Eagleburger, the Acting Secretary of State (substituted as a party pursuant to Rule 35.3); William P. Barr, the Attorney General; Gene McNary, the Commissioner of the Immigration and Naturalization Service; Rear Admiral Robert Kramek and Admiral J. William Kime, United States Coast Guard; and the Commander of the United States Naval Base at Guantanamo Bay, Cuba.

The respondents are the Haitian Centers Council, Inc.; the National Coalition for Haitian Refugees, Inc.; the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut; and the following individual Haitian nationals: Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre and Mathieu Noel. The individual respondents brought the action on behalf of others similarly situated with respect to the interdiction program, including subclasses consisting of Haitian migrants who had been "screened in" or "screened out" or were awaiting screening; relatives of such individuals; and Haitian migrants who had retained one of the respondent organizations to represent them. Compl. ¶¶ 36-41 (92-6090 C.A. App. 25-26).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional amendment, treaty, statutory provision, executive orders, and international agreement involved	2
Statement	2
Reasons for granting the petition	13
Conclusion	30
Appendix A	1a
Appendix B	2a

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 (1980)	23
Augustin v. *Sava*, 735 F.2d 32 (2d Cir. 1984)	16
Becker v. *Schenley Indus., Inc.*, 557 F.2d 346 (2d Cir. 1977)	25
Bertrand v. *Sava*, 684 F.2d 204 (2d Cir. 1982)	19
Bridges v. *Wixon*, 326 U.S. 135 (1945)	16
Chim Ming v. *Marks*, 505 F.2d 1170 (2d Cir. 1974), aff'g 367 F. Supp. 673 (S.D.N.Y. 1973)	19
Cooper v. *Federal Reserve Bank*, 467 U.S. 867 (1984)	23
County of Yakima v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683 (1992)	20
HRC v. *Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987)	19
Jean v. *Nelson*, 727 F.2d 957 (11th Cir. 1984), aff'd on other grounds, 472 U.S. 846 (1985)	16, 18
Johnson v. *Eisentrager*, 339 U.S. 763 (1950)	16
Kleindienst v. *Mandel*, 408 U.S. 753 (1972)	16
Kwong Hai Chew v. *Colding*, 344 U.S. 590 (1953)	16
Landon v. *Plasencia*, 459 U.S. 21 (1982)	6, 10, 15, 23

Cases—Continued: Page

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 22
Montana v. *United States*, 440 U.S. 147 (1979) 25, 26
Nishimura Ekiu v. *United States*, 142 U.S. 651 (1892) 16, 18
Pierre v. *United States*, 547 F.2d 1281 (5th Cir.), vacated on other grounds, 434 U.S. 962 (1977) .. 19
Rafeedie v. *INS*, 880 F.2d 506 (D.C. Cir. 1989) 16, 19
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 15, 17
Stott v. *Haworth*, 916 F.2d 134 (4th Cir. 1990) 25
The Japanese Immigrant Case, 189 U.S. 86 (1903) 16
United States v. *Aguilar*, 883 F.2d 662 (9th Cir. 1989), cert. denied, 111 S. Ct. 751 (1991) 19
United States v. *Mendoza*, 464 U.S. 154 (1984) 22
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 12, 17
United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 10, 15, 18
United States ex rel. Turner v. *Williams*, 194 U.S. 279 (1904) 16
Walker v. *Jim Dandy Co.*, 747 F.2d 1360 (11th Cir. 1984) 25
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 22
Wan Shih Hsieh v. *Kiley*, 569 F.2d 1179 (2d Cir.), cert. denied, 439 U.S. 828 (1978) 18
Washington v. *Harper*, 494 U.S. 210 (1990) 19, 22
Yiu Sing Chun v. *Sava*, 708 F.2d 869 (2d Cir. 1983) 18

Constitution, Treaty, and statutes:

U.S. Const.:
Amend. I 5, 6, 8, 9, 11
Amend. V (Due Process Clause) ..... *passim*
Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No. 10,241 ..... 4, 2a

Treaty and statutes—Continued: Page

Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.I.A.S. No. 418 12
United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 ..... 2, 5
Art. 33, 189 U.N.T.S. 150 ..... 2, 20, 29
Art. 33.1, 189 U.N.T.S. 150 ..... 5, 14, 28
United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150 5
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
§ 101(a)(38), 8 U.S.C. 1101(a)(38) 8
§ 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) 4
§ 207, 8 U.S.C. 1157 ..... 7, 13
§ 207(c)(3), 8 U.S.C. 1157(c)(3) 7
§ 208(a), 8 U.S.C. 1158 4
§ 212(a)(1), 8 U.S.C. 1182(a)(1) 7
§ 212(d)(5)(A), 8 U.S.C. 1182(d)(5)(A) 7
§ 212(d)(5)(B), 8 U.S.C. 1182(d)(5)(B) 7
§ 243, 8 U.S.C. 1253 2
§ 243(h), 8 U.S.C. 1253(h) 11, 14, 19, 28, 29
§ 292, 8 U.S.C. 1362 8
Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981) 2, 4, 6, 14, 20, 24, 29
Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) 2, 3, 13

In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of the Immigration and Naturalization Service, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion at issue here (Pet. App. 73a-124a)[1] is reported at 969 F.2d 1326, and its subsequent opinion (Pet. App. 1a-72a) is reported at 969 F.2d 1350. The district court's opinions on the question presented here (Pet. App. 125a-141a, 142a-163a) and its subsequent opinion (Pet. App. 164a-168a, 169a-170a) are not yet reported. The Eleventh Circuit's opinions in *Haitian Refugee Center (HRC)* v. *Baker* (Pet. App.

[1] Hereinafter, "Pet. App." refers to the appendix to the petition in *McNary* v. *Haitian Centers Council, Inc.*, petition for cert. pending, No. 92-344 (filed Aug. 24, 1992).

171a-190a, 191a-252a) are reported at 949 F.2d 1109 and 953 F.2d 1498, respectively. The district court's December 3, 1991, opinion in *HRC* v. *Baker* (Stay App. 168-230)[2] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1992. A petition for rehearing was denied on July 24, 1992. App., *infra*, 1a. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AMENDMENT, TREATY, STATUTORY PROVISION, EXECUTIVE ORDERS, AND INTERNATIONAL AGREEMENT INVOLVED

The Due Process Clause of the Fifth Amendment and the September 23, 1981, Agreement Between the United States and Haiti are reproduced at App., *infra*, 2a-5a. Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150; Section 243 of the Immigration and Nationality Act, 8 U.S.C. 1253; and Executive Orders Nos. 12,324 and 12,807 are reproduced at Pet. App. 253a-265a.

STATEMENT

This certiorari petition arises out of litigation in the United States District Court for the Eastern District of New York challenging various aspects of the program established by the President to address the crisis resulting from the massive outflow of migrants from Haiti in small, unseaworthy boats. In our pending certiorari petition in *McNary* v. *Haitian Centers Council, Inc.*, No. 92-344 (filed Aug. 24, 1992), we seek review of the Second Cir-

[2] "Stay App." refers to the appendix to the emergency application for a stay pending certiorari that we filed in this Court on July 30, 1992, seeking a stay of the Second Circuit's July 29, 1992, decision.

cuit's July 29, 1992, decision in the same litigation, which directed entry of a preliminary injunction barring implementation of Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992). That Order, issued by the President on May 24, 1992, authorizes the Coast Guard to repatriate directly to Haiti all Haitian migrants interdicted while attempting illegal entry into the United States.

In the instant certiorari petition, we seek review of a separate decision of the Second Circuit dated June 10, 1992, which affirmed a preliminary injunction entered by the district court prior to the May 24 Executive Order. At that time, interdictees who were found to have a credible claim of refugee status were tentatively "screened in" and were generally brought to the United States, where they could formally apply for asylum. However, some interdictees who were screened in also were found to have a communicable disease of public health significance. Such aliens are statutorily excluded from entry, and may be admitted to the United States as refugees only if the Attorney General grants a special waiver. The Immigration and Naturalization Service (INS) decided to conduct further interviews of those interdictees at the U.S. Naval Base at Guantanamo Bay, Cuba, to determine whether they in fact satisfy the statutory definition of "refugee" before deciding whether such special relief is appropriate.

In its June 10 decision, the Second Circuit barred petitioners from interviewing or repatriating any of the affected interdictees to Haiti without first affording them access to an attorney. The court found that these interdictees raised a "serious question" as to whether the Due Process Clause affords them a right to counsel. Pet. App. 104a-118a. That ruling is utterly without merit. The Due Process Clause has no application to aliens outside the United States in connection with their efforts to enter this country. Indeed, respondents are collaterally estopped by the holding to that effect in the *HRC* v. *Baker* class action.

1. The program for interdicting would-be illegal migrants on the high seas was instituted in 1981. In Executive Order No. 12,324, issued in that year, the President directed the Coast Guard to intercept vessels suspected of transporting illegal migrants and to return the passengers to their country of origin, subject to a proviso that any "person who is a refugee" would not be repatriated without his consent. § 2(c)(3), 46 Fed. Reg. 48,109 (1981). Contemporaneously, the United States entered into an agreement with Haiti permitting U.S. officials to interdict and board Haitian flag vessels suspected of carrying illegal migrants. Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. 10,241.

To implement Executive Order No. 12,234, the INS promulgated internal guidelines under which INS officials conducted informal, non-adversarial "screening" interviews of interdictees on board Coast Guard cutters. Any interdictees who made a credible showing of political refugee status were tentatively "screened in" and were paroled into the United States, where they could file a formal application for political asylum under 8 U.S.C. 1158—and, in the process, attempt to establish that they were in fact refugees within the meaning of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(42)(A). Interdictees who were unable to make that threshold showing were "screened out" and repatriated immediately to Haiti. Pet. App. 75a-76a, 193a-197a.

2. The United States temporarily halted repatriation of interdicted Haitians following the military coup in Haiti on September 30, 1991. Repatriations resumed on November 18, 1991, after the immediate post-coup violence subsided. Pet. App. 76a, 144a, 197a. On November 19, 1991, Haitian Refugee Center, Inc. (HRC), and others filed suit (*HRC* v. *Baker*) in the United States District Court for the Southern District of Florida. They alleged, *inter alia*, that the INS had committed "procedural violations" in determining whether interdicted

Haitian migrants should be repatriated, and they sought relief under, *inter alia*, the Fifth Amendment. *HRC* 2d Amend. Compl. ¶¶ 52-61 & Relief Sought (92-6144 C.A. App. 645-648, 651). On the day the complaint was filed, the district court entered a temporary restraining order barring repatriation of any interdictees. Stay App. 114-116. Because interdictions were continuing at a high rate and Coast Guard vessels were seriously overcrowded, U.S. officials decided to house interdictees temporarily at the U.S. Naval Base at Guantanamo Bay, Cuba. Cummings Decl. ¶ 11 (Stay App. 122-123).

The district court in *HRC* subsequently certified a plaintiff class consisting of (Pet. App. 87a):

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval Base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

On December 3, 1991, the district court in *HRC* entered a preliminary injunction that continued the prohibition against repatriations. The court relied on what it found to be a First Amendment right of plaintiff HRC to have access to the interdictees, and on Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, which provides that a Contracting State shall not "expel or return ('refouler')" a refugee to a country where his life or freedom would be threatened, *inter alia*, on account of political opinion.[3] Stay App. 168-230. At the same time, the court rejected the plaintiffs' claim based on the Due Process Clause. It explained that although "[a]liens who successfully enter the United States are entitled to due proc-

---

[3] The United States acceded to Article 33.1 of the Convention by ratifying the United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

ess protections with respect to immigration matters," "the United States Supreme Court 'has long held that an alien *seeking* admission to the United States requests a privilege and has no constitutional rights regarding his application.'" *Id.* at 220 (quoting *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982)).

The Eleventh Circuit reversed the preliminary injunction, Pet. App. 171a-189a, but the *HRC* district court then entered several further injunctions on other grounds. See Pet. App. 199a-202a. In late January 1992, the government sought emergency relief from the Eleventh Circuit, supported by evidence that the bar to repatriations was exacerbating the situation by providing an incentive for Haitians to take to the seas. When the Eleventh Circuit failed to act promptly, this Court granted a stay pending appeal and thus permitted repatriations to resume. 112 S. Ct. 1072 (Jan. 31, 1992).

A few days later, the Eleventh Circuit rendered its decision, reversing the remaining injunctions and ordering dismissal of the action. Pet. App. 190a-252a. The Eleventh Circuit noted that the district court had followed "settled law" in holding that the Haitian interdictees, "who were not present in the United States, had no rights under the United States Constitution and therefore their Fifth Amendment claim must fail." *Id.* at 200a. It also held that neither Executive Order No. 12,324 nor implementing INS guidelines afforded interdictees any enforceable rights, Pet. App. 216a-219a, and that the plaintiff organizations had no First Amendment right of access to Haitian migrants at Guantanamo, Pet. App. 219a-227a. This Court denied the *HRC* plaintiffs' application for a stay and petition for a writ of certiorari on February 24, 1992. 112 S. Ct. 1245.

3. a. Less than a month later, respondents filed this suit in the Eastern District of New York, raising essentially the same challenges to the interdiction program that had been rejected in *HRC*. See 92-6090 C.A. App. 11-32 (Complaint). The suit was apparently prompted in part

by a memorandum from the General Counsel of INS, Grover Joseph Rees, dated February 29, 1992. PX 1 (92-6090 C.A. App. 141-142). That memorandum addressed the special situation of those interdictees who were tentatively screened in but found to have a communicable disease (most often the HIV virus). The INA requires that persons with communicable diseases of public health significance "shall be excluded from admission into the United States." 8 U.S.C. 1182(a)(1). However, under the INA's provisions for admission of refugees from outside the United States, the Attorney General may waive that (and certain other) exclusions "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. 1157(c)(3). The INA further provides that the Attorney General may temporarily parole aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest," 8 U.S.C. 1182(d)(5)(A), but an alien who is a refugee may be paroled under that provision (rather than admitted as a refugee under 8 U.S.C. 1157) only if the Attorney General finds parole to be "require[d]" by "compelling reasons in the public interest." 8 U.S.C. 1182(d)(5)(B).

INS General Counsel Rees concluded that where parole would be premised on the possibility that the alien may be a refugee, but the alien is excludable on medical grounds, the judgment whether "compelling reasons" require parole should be based on the same factors (quoted above) that must inform the decision whether to waive the medical exclusion under the INA's special refugee admission provisions. General Counsel Rees decided that under this standard, the alien, at a minimum, should actually be a "refugee" under the INA. He accordingly directed that an interdictee who has been screened in as a possible refugee, but has a communicable disease of public health significance, should be interviewed further at Guantanamo to determine whether he is in fact a refugee. The General Counsel stated that assessments of interdictees who appear

credible and whose accounts, if true, would establish a well-founded fear of persecution should be forwarded to the State Department for information concerning the accuracy of the applicant's assertions about his own experience and country conditions. 92-6090 C.A. App. 142.

b. On April 6, the district court entered a preliminary injunction that (i) required petitioners to grant the respondent organizations immediate "access" to the individual interdictees housed at Guantanamo, and (ii) enjoined petitioners from reinterviewing or repatriating any interdictees who previously had been screened in, without first allowing them to communicate with counsel. Pet. App. 85a, 142a-163a.[4] The court rejected respondents' contention that the statutory right to counsel conferred by 8 U.S.C. 1362 in deportation and exclusion proceedings extends to the reinterviews at Guantanamo, because the Base is outside the "United States" for purposes of INA. Pet. App. 155a-156a (citing 8 U.S.C. 1101(a)(38)). But the court believed that sufficiently "serious questions" had been raised to furnish a fair ground for litigation on whether the screened-in migrants at Guantanamo have a right under the Due Process Clause to have access to counsel, and whether the respondent organizations have a First Amendment right of access to communicate with screened-in migrants there. Pet. App. 152a-155a, 157a-160a. The court certified a class of "screened-in plaintiffs" entitled to relief under the preliminary injunction. *Id.* at 161a-162a.[5] After unsuccessfully seeking a stay in the Second Circuit, the government sought relief in this

---

[4] The district court previously had entered a temporary restraining order granting much the same relief. See Pet. App. 125a-141a.

[5] In its April 8, 1992, order denying petitioners' motion for a stay pending appeal, the district court stated that even if the appropriate standard were "likelihood of success on the merits,"

Court, which granted a stay on April 22, 1992. 112 S. Ct. 1714.

4. On June 10, 1992, a divided panel of the court of appeals vacated those portions of the preliminary injunction that required the government to grant the respondent organizations immediate access to Guantanamo, but affirmed the prohibition against further interviewing or repatriation of "screened in" interdictees without affording them an opportunity to communicate with counsel. Pet. App. 73a-124a.

The court first concluded that respondents' due process claim is not barred under collateral estoppel principles by the district court's holding in the *HRC* class action that Haitian interdictees outside the United States have no rights under the Due Process Clause in connection with their entry into the United States. Pet. App. 86a-96a. The court did not dispute that the screened in plaintiffs in this case fall within the class in *HRC*, which consists of "all Haitian aliens who are currently detained or who will in the future be detained * * * at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights." *Id.* at 87a. But it believed that there was not sufficient community of interest between the screened-in plaintiffs here and the remainder of the *HRC* class to warrant application of collateral estoppel. In the court's view, the *HRC* litigation focused on allegations by "screened out" migrants that the initial screening procedures were inadequate, and it noted that Haitian migrants who had been "screened in" under those procedures would not have been likely to challenge them as inadequate. *Id.* at 94a-96a. The court also justified its

---

rather than "sufficiently serious questions" going to the merits, that higher standard had also been satisfied. 92-6090 C.A. App. 105-108; Pet. App. 84a-85a.

refusal to apply collateral estoppel on the ground that the procedure outlined in the February 29, 1992 Rees memorandum for reinterviewing at Guantanamo those "screened in" migrants who have communicable diseases constituted a material change in INS policy. *Id.* at 96a.

On the merits, the court of appeals held that the proper standard for assessing the propriety of a preliminary injunction is not whether respondents had shown a likelihood of success on the merits, but rather whether they had raised "sufficiently serious questions going to the merits," coupled with a balance of hardships tipping decidedly in their favor. Pet. App. 96a-98a. Applying that standard, the court concluded that the Haitian respondents had at least raised a serious question on their claim of a due process right of access to counsel at Guantanamo. *Id.* at 99a-115a. It recognized that under this Court's precedents, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application," and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 101a (quoting *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), and *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950)). The court further recognized that Congress has not authorized any particular procedures applicable to the interdicted Haitians at Guantanamo, since (as the district court held) the asylum and other relevant provisions of the INA and implementing regulations apply only within the United States. Pet. App. 101a-102a. But the court thought that the Due Process Clause nonetheless has independent force in this setting because the aliens involved are at a location subject to plenary U.S. control, Pet. App. 103a-109a, and have been "screened in" as possible candidates for refugee status, *id.* at 109a-115a.

The court found the policy of interdicting Haitian migrants and bringing them to Guantanamo to be consistent with the 1981 Agreement between the United States and

Haiti and the U.N. Protocol (see page 5 and note 3, *supra*), and observed that "[b]y these humanitarian actions alone, it does not appear that the legal status of the aliens was altered." Pet. App. 112a. But the court believed that the subsequent "screening in" of an interdictee "implicates the Agreement between the United States and Haiti[6], the Refugee Act of 1980 [which amended 8 U.S.C. 1253(h) 7], the Executive Order and the Protocol, to which we are a signatory." Pet. App. 112a-113a. As the court saw it, those measures created a "reasonable expectation" on the part of screened-in interdictees that they would not be "wrongly repatriated," because upon being screened in, their "fundamental legal and human rights status is changed vis-a-vis the United States government." *Id.* at 113a. This "altered status," the court concluded, meant that the interdictees are entitled in their reinterviews to due process rights, which, in its view, include the advice of counsel. *Id.* at 113a-115a.[8]

---

[6] The Agreement provided, *inter alia*, that the United States "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." See App., *infra*, 4a; Pet. App. 75a.

[7] As amended, 8 U.S.C. 1253(h) provides, subject to certain exceptions, that "[t]he Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of * * * political opinion."

[8] The court affirmed the district court's findings that the "screened in" but medically excludable migrants would suffer irreparable injury in the absence of an injunction and that the balance of hardships weighed in their favor. Pet. App. 99a, 115a-117a. The court also stated that to the extent the "likelihood of success on the merits" standard applies, it was "inclined to agree" with the district court that that higher standard was met as well. *Id.* at 117a n.19. The court did not address the merits of the respondent organizations' First Amendment claim of a right of access to Guantanamo. It nevertheless vacated that portion of the injunction because it went beyond maintenance of the status quo and because the First Amendment issue would have been effectively decided with

b. Judge Mahoney dissented. Pet. App. 118a-124a. He noted that this Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the *sovereign territory* of the United States," *id.* at 120a (quoting *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990)), and that in the lease agreement governing Guantanamo Bay, the United States recognizes the "ultimate sovereignty" of Cuba over the Base. Pet. App. 120a (quoting Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.I.A.S. No. 418). Judge Mahoney further observed that "Congress has vested the Attorney General with almost complete discretion, within numerical limits, to permit immigration of refugees from outside the country's borders." Pet. App. 119a. Here, he reasoned, "the initial screening interview is simply one step in the process for an alien interdicted at sea to gain admission into this country," and "Congress has explicitly authorized the executive to exclude an alien seeking admission who is determined to have a communicable disease." *Id.* at 123a. "It accordingly seems curious," Judge Mahoney concluded, "that a second screening interview of an individual located outside this country, designed to gather information that might aid the Attorney General in reaching a determination whether to exercise his discretion and waive the exclusion, would run afoul of the Constitution." *Ibid.* (citation omitted).

c. The Second Circuit denied the government's petition for rehearing with suggestion of rehearing en banc on July 24, 1992. App., *infra*, 1a. Because the June 10 decision does not require petitioners to grant the respondent organizations immediate access to Guantanamo and affects for now only the several hundred screened-in Haitians at Guantanamo who have communicable diseases and who therefore await further interviews there (see note 18,

---

finality at the preliminary injunction stage if the organizations had been granted such access. *Id.* at 100a, 116a.

infra), petitioners have not yet found it necessary to seek emergency relief by applying for a stay in this Court.[9]

5. As we explain in our certiorari petition (at 7-9) in No. 92-344, while the appeal of the preliminary injunction at issue here was still pending before the Second Circuit, the Haitian migrant situation once again reached crisis proportions. The President decided to continue the interdiction program but to repatriate all interdictees directly to Haiti, and to provide instead for processing of applications for refugee admission to the United States at our Embassy in Port-au-Prince, pursuant to 8 U.S.C. 1157. That decision was embodied in Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992), issued May 24, 1992, which revoked and replaced Executive Order No. 12,324. The May 24 Executive Order does not require any screening of interdicted Haitian migrants, but it provides that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." § 2(c)(3).

On July 29, 1992, the Second Circuit, in another sharply divided decision, ordered entry of a preliminary injunction barring implementation of Executive Order No. 12,807. Pet. App. 1a-72a. This Court granted a stay of that decision on August 1, 1992, and on August 24, we filed our certiorari petition in No. 92-344, seeking review of the July 29 decision.

---

[9] Although petitioners have not yet sought a stay of the Second Circuit's decision, the situation at the Guantanamo Naval Base is becoming increasingly difficult. Many of the Haitian migrants have been at the Naval Base for several months, and we are informed by U.S. military officials at Guantanamo that many of the migrants have expressed a strong preference to return to Haiti, rather than to wait longer at Guantanamo. The Second Circuit's decision, however, may well bar such voluntary repatriations. In addition, some of the migrants infected with the HIV virus face increasing medical complications. For example, over the past few weeks, the Government has brought several migrants to the United States for emergency medical care, including several HIV-positive pregnant women.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly held that control over immigration lies with the political Branches, which have exclusive authority to prescribe standards and procedures for admission of aliens to this country. It is absolutely clear under this Court's cases that aliens outside the United States who are seeking initial entry have no rights under the Due Process Clause. The Second Circuit has created, out of whole cloth, an unprecedented exception to that principle. It has determined, for purposes of granting a preliminary injunction, that Haitian interdictees at Guantanamo Bay, Cuba, may assert a due process right to the assistance of counsel in connection with their applications for admission, and it has halted any further interviewing of screened-in interdictees at Guantanamo until counsel has been made available. That holding has not only disrupted the informal and non-adversarial refugee processing at Guantanamo; it also has undermined the flexibility the political Branches may require in the future to respond to unfolding developments in the Haitian migrant crisis. And as a legal matter, the holding below constitutes such a sharp departure from established precedent that summary reversal is appropriate.

Furthermore, even if the Due Process Clause might be judicially extended to some immigration matters beyond our borders, the Clause would still not be triggered unless the alien concerned could point to some "liberty" interest. None of the sources cited by the court of appeals—Article 33.1 of the U.N. Convention; Section 243(h) of the INA, 8 U.S.C. 1253(h); Executive Order No. 12,324 (which has since been revoked); and the 1981 Agreement between the United States and Haiti—confers any such liberty interest on Haitian interdictees outside the United States. Respondents' due process claim must fail for this additional reason as well.

The Second Circuit's ruling on the due process issue is all the more disturbing because the legal principles gov-

erning this case were reaffirmed less than a year ago in the *HRC* v. *Baker* class action challenging the interdiction program. There, the court correctly held that the Due Process Clause has no application to interdictees' efforts to enter the United States. The Haitian interdictees in this case were parties to *HRC* and are bound by that holding. They also are bound by the further holding in *HRC* that Haitian aliens outside the United States have no rights under Article 33.1 of the U.N. Convention, 8 U.S.C. 1253(h), or Executive Order No. 12,324, which fatally undermines the respondent interdictees' reliance on those provisions in this case as a predicate for establishing a liberty interest protected by the Due Process Clause. Accordingly, if the Court believes that plenary review is appropriate, it should reverse the Second Circuit's threshold refusal to apply the doctrine of collateral estoppel to bar respondents' due proces claim.

1.a. The court of appeals' reliance on the Due Process Clause in affirming an injunction barring further processing or repatriation of the interdictees at Guantanamo unless they are afforded access to counsel squarely conflicts with this Court's precedents. Contrary to the court of appeals' view, Pet. App. 99a-113a, there can be no "serious question" that the Due Process Clause is altogether inapplicable in this setting.

As this Court has stated repeatedly, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). Although aliens who have entered the United States are entitled to constitutional protections in a deportation proceeding, "an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S.

537, 544 (1950)). These principles have repeatedly been recognized by this Court. See, e.g., *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892); *The Japanese Immigrant Case*, 189 U.S. 86, 97, 100 (1903); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953);[10] cf. *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972).

The Court reaffirmed these principles just several terms ago in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990). There, the Court observed that although "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country," *id.* at 271, it "ha[s] rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," *id.* at 269 (discussing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). The courts of appeals, including the court below, likewise have reiterated the rule that aliens have no constitutional rights in connection with their initial entry into the United States.[11] The court of appeals therefore plainly erred in holding that respondents—who are aliens outside the United States seeking initial entry—have raised a "serious question" going to the merits of their due process claim of a right of access to counsel in connection with their applications for admission.

---

[10] The Court stated in *Kwong Hai Chew:* "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." 344 U.S. at 596 n.5 (quoting *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

[11] See *Rafeedie* v. *INS*, 880 F.2d 506, 520 (D.C. Cir. 1989) (quoted at page 19, *infra*); *Augustin* v. *Sava*, 735 F.2d 32, 36 (2d Cir. 1984) (aliens petitioning for admission are "requesting a privilege" and "have no constitutional rights regarding their applications"); *Jean* v. *Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (en banc) ("Aliens seeking admission * * * must be content to accept whatever statutory rights and privileges they are granted by Congress"), aff'd on other grounds, 472 U.S. 846 (1985).

b. In concluding that respondents may nevertheless have rights under the Due Process Clause, the court of appeals cited two factors. First, the court found it significant that the interdictees involved are housed at the U.S. Naval Base at Guantanamo, which is subject to U.S. jurisdiction and control. Pet. App. 103a-109a. Second, it relied upon respondents' "screened in" status, as interdictees who have been tentatively deemed to possess at least a plausible claim to refugee status. *Id.* at 109a-115a. Neither of these factors, however, furnishes any justification whatever for the court's holding.

i. The court of appeals' notion that the geographical reach of the Due Process Clause might be extended to the group of aliens seeking entry in this case because of the United States' occupation of the Naval Base at Guantanamo Bay is without merit for two independent reasons. First, the rights of the United States at Guantanamo Bay arise only from its status as a lessor under the 1903 agreement with Cuba (quoted at Pet. App. 105a). Those rights do not include the prerogatives of sovereignty, which the United States does not claim with respect to Guantanamo. As Judge Mahoney pointed out below, Pet. App. 120a, that much is established by the 1903 Agreement itself, which expressly provides that "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [specified] areas of land and water." This case accordingly is controlled by the Court's previous rejection of "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 269.

Second, the well-settled principle that an alien seeking admission to this country has no rights under the Due Process Clause (but must instead accept whatever procedures are provided by statute and regulation) applies even where the alien has reached a port of entry and is detained within the United States pending determination of his application for admission. Thus, in *Mezei*, the

Court held that, although the alien was detained at Ellis Island, he enjoyed no procedural rights beyond those afforded by statute. It explained that the alien's "harborage at Ellis Island is not an entry into the United States" and that his confinement within U.S. borders did not "transform[] this into something other than an exclusion proceeding." 345 U.S. at 213; see also *Knauff*, 338 U.S. at 542; *Nishimura Ekiu*, 142 U.S. at 659-660. *A fortiori*, the United States' exercise of jurisdiction and control over a Naval Base in a hostile foreign country does not extend the protections of the Due Process Clause to aliens who are temporarily housed there.[12]

The Eleventh Circuit relied on the foregoing decisions in applying to Haitian migrants detained at INS facilities in Florida the rule that "[a]liens seeking admission to the United States * * * have no constitutional rights with regard to their applications." *Jean* v. *Nelson*, 727 F.2d at 968. The Second Circuit's reliance on the Due Process Clause to afford rights to aliens at facilities in a foreign country necessarily conflicts with that ruling by the Eleventh Circuit, as well as this Court's own decisions and the district court's ruling in the *HRC* class action.

ii. Quite aside from the inapplicability of the Due Process Clause as a geographical matter, respondents have no liberty interest that would be protected by that Clause in connection with interviews at Guantanamo. There can be no claim here, as there might be in other settings, that

---

[12] Executive officials routinely make determinations with respect to immigration and refugee status at locations abroad that are subject to extensive U.S. control, such as U.S. embassies. But the characteristics of the location at which such determinations are made has never been thought to affect the rights of applicants. It is settled, for example, that a visa applicant at an embassy has no procedural rights regarding his application. See *Yiu Sing Chun* v. *Sava*, 708 F.2d 869, 875 (2d Cir. 1983) (citing *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978)).

respondents have any liberty interest independent of rights created by statute or treaty or by implementing administrative measures that confer private rights. *Cf. Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990). As we have explained above, an alien applicant for initial admission "has no liberty (or other) interest in entering the United States, and thus has no constitutional right to *any* process in that context; whatever Congress by statute provides is obviously sufficient, so far as the Constitution goes." *Rafeedie* v. *INS*, 880 F.2d at 520.

The court of appeals believed, however, that "[u]pon being 'screened in,' the Haitian aliens' fundamental legal and human rights status is changed vis-a-vis the United States government," because, in its view, " 'screening in' implicates the Agreement Between the United States and Haiti, the Refugee Act of 1980, the Executive Order and the Protocol." See Pet. App. 113a. The court was completely mistaken. Those provisions neither refer to the screening process at issue here nor indicate what procedures might be used to identify refugees outside the United States. But more fundamentally, those provisions do not confer any substantive rights upon aliens beyond our borders:

First, the court of appeals itself recognized that the U.N. Protocol "does not grant rights beyond those afforded under this nation's domestic law," Pet. App. 110a n.13—a view that is consistent with prior Second Circuit holdings and with the decision of every other court of appeals that has considered the question.[13] Furthermore, as we explain in our certiorari petition in No. 92-344 (at

---

[13] *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982); *Chim Ming* v. *Marks*, 505 F.2d 1170, 1172 (2d Cir. 1974), aff'g, 367 F. Supp. 673, 677-679 (S.D.N.Y. 1973); *HRC* v. *Baker*, Pet. App. 173a; *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 111 S. Ct. 751 (1991); *Pierre* v. *United States*, 547 F.2d 1281, 1288 (5th Cir.), vacated on other grounds, 434 U.S. 962 (1977); *HRC* v. *Gracey*, 600 F. Supp. 1396, 1401, 1406 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).

21-26), Article 33 of the U.N. Convention (to which the United States adhered by virtue of ratifying the Protocol) does not in any event apply to aliens outside the territory of the Contracting State.

Second, as we also explain in our petition in No. 92-344 (at 17-28), 8 U.S.C. 1253(h), as amended by the Refugee Act of 1980, likewise does not apply to aliens outside the United States. Its geographical reach therefore is no broader than that of the asylum provision of the INA, which was also added by the Refugee Act of 1980 and which (as the court below recognized, Pet. App. 101a-102a) is limited to aliens "physically present in the United States or at a land border or port of entry." 8 U.S.C. 1158(a).

Third, Executive Order No. 12,324 was revoked prior to the court of appeals' decision (see page 13, *supra*), and thus could furnish no basis for finding a protected liberty interest. In any event, the Executive Branch officials charged with implementation of the Executive Order authoritatively construed it not to confer private rights on interdictees, and the Eleventh Circuit so held in *HRC*. See Pet. App. 216a-218a.[14]

---

[14] The Executive Order's statement that "no person who is a refugee will be returned without his consent" (Pet. App. 265a) was a mere proviso to the President's description of what the internal instructions from the Secretary of Transportation to the Coast Guard regarding the interdiction program should include—specifically, a requirement that the Coast Guard return the interdicted vessel and its passengers to the country from which it came, if there was reason to believe an offense was being committed. "[B]ecause a proviso can only operate within the reach of the principal provision it modifies," *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 690 (1992), the proviso was part of the internal instructions to the Coast Guard, rather than a source of personal rights for individuals external to the Coast Guard's operations. Furthermore, as the Eleventh Circuit pointed out, Pet. App. 217a-218a, the Executive Order contemplated interdiction and screening on the high seas, under exigent circumstances and with prompt repatriation of aliens found not to qualify for refugee status. An Executive Order

Fourth, the 1981 Agreement with Haiti confers no private rights on interdictees that could form the basis for a liberty interest protected by the Due Process Clause. That document is essentially a law enforcement agreement between two governments. The portion on which the court below relied (see note 6, *supra*) can only reasonably be construed to put the Government of Haiti on notice of the U.S. Government's then-present intention not to repatriate refugees; it accordingly served the purposes of the U.S. Government, not the Haitian Government or its nationals.

c. The court of appeals also failed to view the screening decision in the context of the interdiction program as a whole. At the time when the INS was bringing interdictees to Guantanamo, it had decided to use a two-step process to determine whether they were refugees—initial screening, followed by a more complete examination (either in asylum proceedings in the United States or at Guantanamo) of those interdictees who are tentatively screened-in. As Judge Mahoney explained, " 'screening in' of a Haitian alien [did] not determine whether the alien is a 'refugee' or is entitled to admission to the United States." Pet. App. 123a. It simply "mean[t] that after a preliminary interview, someone ha[d] been identified as *possibly* having refugee characteristics." Rees Dep. at 5 (emphasis added) (92-6090 C.A. App. 341). Thus, although the decision to screen in an interdictee might have increased the likelihood that he would ultimately be found to be a refugee, it did not, in itself, affect his legal status or rights. To the contrary, because the initial screening was "simply one step in the process for an alien interdicted at sea to gain admission to this country," Pet. App. 123a (Mahoney, J., dissenting)—and because interdictees have no rights under the Fifth Amendment in connection with that overall process—the fact that an interdictee made a

---

applicable to such conditions should not lightly be construed to confer substantive or procedural rights of the sort that could give rise to liberty interests protected by the Due Process Clause.

sufficient threshold showing to get past the initial stage plainly did not trigger any rights under the Due Process Clause at later stages.

d. For the foregoing reasons, the Second Circuit's reliance on the Due Process Clause to support a preliminary injunction barring further interviews or repatriation of interdictees at Guantanamo until they have been given access to an attorney is utterly without merit.[15] Because it conflicts with numerous decisions of this Court and rulings by other courts of appeals, review is warranted. And because the Second Circuit's error is so clear, we believe that summary reversal would be appropriate.

2. The court of appeals should not even have reached the merits of respondents' due process challenge to the screening procedures utilized by the INS at Guantanamo. That challenge is barred as a threshold matter under collateral estoppel principles by the judgment in the *HRC* class action, which held that Haitian interdictees outside the United States have no rights under the Due Process Clause in connection with their efforts to enter the United States.

---

[15] Moreover, even if we assume, *arguendo*, that the Due Process Clause confers some rights on an alien in this setting, it does not follow, contrary to the court of appeals' almost casual conclusion (see Pet. App. 115a), that a right of access to counsel is among them. What process is due in any giving setting depends on a balancing of the respective interests. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Here, an informal, non-adversarial procedure, coupled with an investigation of in-country conditions by the State Department where the interview indicates that is called for (see pages 7-8, *supra*), more than satisfies whatever standards the Due Process Clause might demand, especially in view of the foreign setting of the refugee processing. Cf. *Washington* v. *Harper*, 494 U.S. 210, 236 (1990); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985). Indeed, the interdictees involved in this case, by successfully passing the threshold screening stage, have already demonstrated their ability to communicate the basis for their claims to be refugees without the assistance of counsel.

a. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); see also *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984). As the court of appeals recognized, Pet. App. 93a, this rule is fully applicable to the judgment in a class action. *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 874, 880 (1984).

The *HRC* litigation resolved the question of the reach of the Due Process Clause in this setting. Invoking that Clause, the plaintiff class in *HRC* challenged the procedures by which the INS interviewed Haitian interdictees at Guantanamo (and on the high seas) to determine whether they should be repatriated to Haiti. The *HRC* district court rejected that challenge. It recognized that, although aliens within the United States are entitled to due process regarding immigration matters, the "Supreme Court 'has long held that an alien *seeking* admission to the United States requests a privilege and has no constitutional rights regarding his application.' " Stay App. 220 (quoting *Landon* v. *Plasencia*, 459 U.S. at 32). The plaintiffs did not appeal that holding, and the Eleventh Circuit later noted that it was dictated by "settled law." Pet. App. 200a.

Moreover, the plaintiff class in *HRC* is defined in terms that unquestionably include the "screened in" plaintiffs in this case. It consists of—

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

Pet. App. 87a. The Second Circuit did not dispute that the screened-in Haitian interdictees in this case are in-

cluded in the *HRC* class. It follows that the judgment in *HRC* forecloses their due process claim here.

b. The court of appeals nevertheless refused to apply collateral estoppel. It pointed out that the named plaintiffs in *HRC* were Haitian interdictees who had been screened out and that the *HRC* litigation focused on allegations that the initial screening procedures were inadequate. By the same token, the court observed that interdictees who were screened in on the basis of those initial screening procedures would have been unlikely to challenge them as inadequate. For these reasons, it believed that there was not sufficient "community of interests" between the screened in Haitian interdictees before the Court here and the other members of the *HRC* class to warrant application of collateral estoppel. Pet. App. 88a, 93a-96a. This rationale for avoiding the preclusive effect of *HRC* is without merit.

Even if we assume, *arguendo*, that the Haitian interdictees who were ultimately screened in might not have had a full community of interests with other members of the *HRC* class on certain issues, the question whether interdictees housed at Guantanamo have rights protected by the Due Process Clause in seeking admission to the United States surely is not among them. On *that* issue, there is no reason to doubt that the named plaintiffs in *HRC* fully and fairly represented the interests of those members of the *HRC* class who already had been or later were screened in.[16]

---

[16] The court of appeals got it backwards by focusing on whether screened-in interdictees would have been likely to challenge the adequacy of the initial screening procedures under the Due Process Clause. See Pet. App. 94a, 96a. The adequacy of the initial screening procedures—and the question whether the interdictees who have since been screened-in would be adequate representatives of a class challenging those procedures—are not involved here. Rather, the relevant question for present purposes is whether the named plaintiffs in *HRC* adequately represented the interests of the interdictees here in arguing that the Due Process Clause may apply to refugee processing at Guantanamo. For the reasons stated in the text, they did.

Nor would it have been either sensible or feasible to divide the *HRC* class into subclasses of "screened in" and "screened out" interdictees, as the court of appeals suggested. See Pet. App. 94a. The vast majority of the Haitian migrants who were ultimately interdicted during the pendency of the *HRC* litigation had not been either screened in *or* screened out when the class was proposed and certified. It therefore is not surprising that the named plaintiffs in *HRC* focused their attention on establishing more elaborate procedures for the initial screening interviews. Such relief, if granted, obviously would not have been limited to interdictees who had already been screened out at the time the motion for class certification was filed or granted. Under these circumstances, the district court in *HRC* can hardly be faulted for accepting the all-inclusive class definition proposed by the *HRC* plaintiffs, who were mounting a broad challenge to the interdiction program on behalf of *all* interdictees.[17]

The court of appeals also relied in passing on the fact that the February 29 Rees memorandum was not issued until after the judgment was entered in *HRC*. Pet. App. 96a. That rationale for avoiding collateral estoppel is equally flawed. Although this Court has recognized that "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues," *Montana* v. *United States*, 440 U.S. 147, 159 (1979), the Rees memorandum was not such a change. The *HRC* court did not reject the plaintiff due process claim of the plaintiff class because it found the procedures then in place to be adequate; its holding rested on the conclusion that the Due Process Clause affords *no* protection to aliens seeking entry into the United States. Although the respondents have characterized this suit as a challenge to the newly announced policy

---

[17] "It has long been the law that questions concerning class certification are left to the sound discretion of the district court." *Walker* v. *Jim Dandy Co.*, 747 F.2d 1360, 1363 (11th Cir. 1984); *accord Stott* v. *Haworth*, 916 F.2d 134, 139 (4th Cir. 1990); *Becker* v. *Schenley Indus., Inc.*, 557 F.2d 346, 348 (2d Cir. 1977).

of the Rees memorandum, their challenge can succeed only if the courts below reject the *HRC* court's holding that the Due Process Clause confers no procdural rights on aliens seeking to enter the United States. Cf. *Montana*, 440 U.S. at 159-160; Pet. App. 45a-49a (July 29 decision) (Walker, J., dissenting). Collateral estoppel prevents such evasion of an adverse judgment.

c. The class-action challenge to the interdiction program in *HRC* was deliberately cast by the HRC plaintiffs in broad terms, and it was litigated by the government and decided by the courts in the government's favor on that basis. As a result, the central teaching of *HRC* is that the various provisions of the Constitution, treaties and laws of the United States invoked by the Haitian interdictees in that case do not circumscribe the broad discretion of the President and those in the Executive Branch who implement the interdiction program on his behalf. That teaching cannot be ignored here simply because the responsible Executive Branch officials have exercised the very discretion that was confirmed by the judgment in *HRC* to revise the screening procedures. The refusal by the Second Circuit to enforce the collateral estoppel consequences of the due process holding in *HRC* therefore invites renewed challenges to the interdiction program every time the President or his subordinates find it necessary to adapt the program in light of experience or changed circumstances.

3.a. The decision below warrants review by this Court. The injunction affirmed by the Second Circuit threatens greatly to interefere with the implementation of the interdiction program established by the President. The Executive Branch officials concluded that the interdictees who have communicable diseases should be reinterviewed at Guantanamo, in order to inform the Attorney General's judgment about whether to waive the medical exclusion for particular interdictees and to parole those interdictees into the United States or admit them as refugees. Those determinations, and the procedures used to

make them, are wholly discretionary with the Attorney General. Exercising that authority, the INS concluded that an informal interview procedure would be most appropriate and expeditious, and that the assistance of counsel was neither necessary nor consistent with that procedure. The decision below has already interfered with the ability of the INS to complete the rescreening process expeditiously; and if it remains in effect, it will improperly encumber and formalize that process. At the present time alone, the injunction affects determinations yet to be made with respect to 291 Haitian interdictees at Guantanamo.[18]

In addition, the decision below, if allowed to stand, would as a practical matter limit the available options in responding to changed circumstances. It might, for example, rule out the possibility of directing that all interdictees shall once again be brought to Guantanamo, but with the modification that full refugee determinations concerning interdictees who make a sufficient threshold showing will be made there, rather than in asylum proceedings in the United States.

b. As we have explained above, the Second Circuit's reliance on the Due Process Clause to require that screened-in interdictees have access to attorneys before they are reinterviewed or repatriated is flatly inconsistent with settled precedent and should be summarily reversed. But if the Court believes that plenary review is warranted, it should grant review on the collateral estoppel issue as well. That issue is important in its own right,

---

[18] We have been informed by the INS that there are currently at Guantanamo 230 interdictees who were screened in but are infected with the HIV virus and thus are ineligible for admission absent a waiver by the Attorney General, and an additional 61 immediate relatives of such individuals. All other interdictees brought to Guantanamo prior to May 24 have either been repatriated to Haiti or paroled into the United States. Several HIV-positive migrants, including several HIV-positive pregnant women, at Guantanamo have been brought to the United States for medical treatment.

because the Second Circuit's limited view of the preclusive effect of the judgment in *HRC* exposes the interdiction program to repeated judicial challenges and second-guessing. That issue also is logically antecedent to the merits of respondents' due process claim, and the Court therefore should review the Second Circuit's refusal to enforce that threshold bar to respondents' due process claim if it concludes that the decision below should be considered more fully than a summary disposition might allow.

c. In the alternative, if the Court decides not to make a summary disposition at this time, it may wish to consider holding this petition pending the disposition of *McNary* v. *Haitian Centers Council, Inc.*, No. 92-344 (filed Aug. 24, 1992). That is because—if we put to one side the aspect of the due process issue that is controlled by this Court's precedents and therefore warrants summary reversal—there is much commonality among the issues raised in the two petitions. For example, we argue in our certiorari petition in No. 92-344 (at 17-28) that Article 33.1 of the U.N. Convention and 8 U.S.C. 1253(h) are inapplicable to aliens outside the United States, and respondents state in their brief in opposition (at 10 n.11) in No. 92-344 that they intend to rely on the 1981 Agreement between United States and Haiti as an alternative ground for affirmance there. If the Court grants certiorari in No. 92-344 and agrees with our position that those provisions confer no rights on interdictees, its holding will establish that the Second Circuit erred in relying on those same provisions in its June 10 decision in holding that interdictees at Guantanamo have a protectible liberty interest because their legal position was altered when they were "screened in."

We also argue in our petition in No. 92-344 (at 14-17) that the Haitian interdictees' claims are barred under collateral estoppel principles by the judgment in *HRC*, just as we argue here that collateral estoppel bars their due process claim in light of the *HRC* district court's holding

that the Due Process Clause is inapplicable to aliens at Guantanamo seeking initial entry into the United States. Moreover, among the other issues that the interdictees in this case are barred from relitigating are whether Article 33 of the Convention, 8 U.S.C. 1253(h), or Executive Order No. 12,324 affords them any private rights that could, in turn, give rise to a liberty interest protected by the Due Process Clause. The Eleventh Circuit in *HRC* held that Haitian interdictees have no rights under any of those provisions. A ruling by this Court in No. 92-344 regarding the collateral estoppel effect of those holdings in *HRC* might shed light on the collateral estopepl effect to be given those same holdings in these proceedings on the due process issue. For this reason as well, the Court may wish to hold this petition pending the disposition in No. 92-344 if it chooses not to summarily reverse the judgment below at the present time.

CONCLUSION

The Court should summarily reverse the judgment below, on the ground that Haitian interdictees outside the United States have no rights under the Due Process Clause in connection with their applications for admission to the United States. If the Court concludes that summary reversal is appropriate, it should limit the grant of certiorari to question 1 in this petition, which presents the due process issue. However, if the Court concludes that plenary review is warranted, it should also grant certiorari on the collateral estoppel issue presented by question 2. In the alternative, the Court may wish to hold this petition and dispose of it as appropriate in light of the disposition in *McNary* v. *Haitian Centers Council, Inc.*, petition for cert. pending, No. 92-344 (filed Aug. 24, 1992).

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

PAUL T. CAPPUCCIO
Associate Deputy Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
PETER R. MAIER
Attorneys

SEPTEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of July, one thousand nine hundred and ninety-two.

Docket Number: 92-6090 (L)
92-6104

HAITIAN CENTERS COUNCIL, INC., ET AL.,
PLAINTIFF-APPELLEES

v.

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
DEFENDANT-APPELLANTS

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant, Commander, US Naval.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED, Judge Mahoney dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX B

CONSTITUTIONAL PROVISION AND INTERNATIONAL AGREEMENT INVOLVED

1. The Due Process Clause of the Fifth Amendment of the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

2. The Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No. 10,241, provides:

HAITI

Migrants—Interdiction

Agreement effected by exchange of notes
Signed at Port-au-Prince September 23, 1981;
Entered into force September 23, 1981.

The American Ambassador to the Haitian Secretary of State for Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
PORT-AU-PRINCE, HAITI

No. 237 September 23, 1981

Excellency:

I have the honor to refer to the mutual concern of the Governments of the United States and of the Republic of Haiti to stop the clandestine migration of numerous residents of Haiti to the United States and to the mutual desire of our two countries to cooperate to stop such illegal migration.

The United States Govenment confirms the understandings discussed by representatives of our two governments -

for the establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti.

Having regard to the need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January 1967,* the United States Government confirms with the Government of the Republic of Haiti its understanding of the following points of agreement:

Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.

The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

The Government of the Republic of Haiti also agrees in the case of a U.S. flag vessel, outbound from Haiti, and engaged in such illegal trafficking, to permit, upon prior notification, the return to a Haitian port of that vessel and those aboard.

In any case where a Haitian flag vessel is detained, the authorities of the United States Government shall

promptly inform the authorities of the Government of the Republic of Haiti of the action taken and shall keep them fully informed of any subsequent developments.

The Government of the Republic of Haiti agrees, to the extent permitted by Haitian law, to prosecute illegal traffickers of Haitian migrants who do not have requisite permission to enter the country of the vessel's destination and to confiscate Haitian vessels or stateless vessels involved in such trafficking. The United States Government likewise agrees, to the extent permitted by United States law, to prosecute traffickers of United States nationality and to confiscate United States vessels engaged in such trafficking.

The Government of the United States agrees to the presence of a repreresentative of the Navy of the Republic of Haiti as liaison aboard any United States vessel engaged in the implementation of this cooperation program.

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

In furtherance of this cooperative undertaking the United States Government formally requests the Government of the Republic of Haiti's consent to the boarding by the authorities of the United States Government of private Haitian flag vessels [in any case] in which such authorities have reason to believe that the vessels may be involved in the irregular carriage of passengers outbound from Haiti.

I have the honor to propose that, if the foregoing is acceptable to the Government of the Republic of Haiti, this note and Your Excellency's confirmatory reply con-

stitute an agreement between the United States Government and the Government of the Republic of Haiti which shall enter into force on the date of your reply and shall continue in force until six months from the date either government gives notice to the other of its intention to terminate the agreement.

Accept, Excellency, the renewed assurances of my highest consideration.

ERNEST H. PREZO

His Excellency
Edouard Francizque
Secretary of State for Foreign Affairs
Port-au-Prince

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 60045

FILED
MAR 11 1993
OFFICE OF THE CLERK

No. 92-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *ET AL.*,

Petitioners,

vs.

HAITIAN CENTERS COUNCIL, INC., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' OPPOSITION

HAROLD HONGJU KOH
Lowenstein International Human Rights Clinic
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4932

LUCAS GUTTENTAG
JUDY RABINOVITZ
Immigrants' Rights Project
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ROBERT RUBIN
IGNATIUS BAU
National Refugee Rights Project
Lawyers' Committee for Civil Rights of the Bay Area
301 Mission Street
San Francisco, California 94105
(415) 543-9444

*MICHAEL D. RATNER
SUZANNE SHENDE
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6464

JOSEPH TRINGALI
SUSAN SAWYER
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Attorneys for Respondents
**Counsel of Record*

3911

QUESTIONS PRESENTED

1. Whether the lower courts abused their discretion by finding sufficiently serious questions going to the merits that the Fifth Amendment Due Process Clause applies to non-accused, non-hostile, "screened-in" Haitian aliens being held in custody on territory within the exclusive jurisdiction and control of the United States in connection with their efforts to avoid return to Haiti where they face political persecution and even death.

2. Whether the courts below abused their discretion by finding that the Eleventh Circuit's ruling barring "screened-out" Haitians from challenging initial INS screening procedures did not collaterally estop "screened-in" Haitians from challenging a new government practice of reinterviewing "screened-in" Haitians on Guantanamo without legal counsel and forcibly repatriating them to Haiti.

Table of Contents

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 1

STATEMENT 3

I. Background 3
II. *HRC v. Baker* 4
III. *HCC I* 6
IV. *HCC II* 8
V. District court proceedings since the close of the record before the court of appeals 9

REASONS FOR DENYING THE WRIT 10

I. This Court should not review a fact-specific, nonfinal order that maintains the *status quo* when review will not decide all of the issues between the parties, particularly when a fuller record is now being made at trial. 10

II. The district court did not abuse its discretion by issuing the nonfinal order here, and the court of appeals properly affirmed that order as modified. 16

Page

III. The courts below did not abuse their discretion by holding that the Eleventh Circuit's ruling barring "screened-out" Haitians from challenging initial INS screening procedures did not collaterally estop "screened-in" Haitians from challenging a new government practice of reinterviewing "screened-in" Haitians on Guantanamo without legal counsel and forcibly repatriating them to Haiti. 23

IV. Alternatively, the petition should be held and disposed of in light of no. 92-344, *Sale v. Haitian Centers Council, Inc.*; under no scenario would the remedy of summary reversal be appropriate. 27

CONCLUSION 30

Table of Authorities

Page(s)

Cases

American Constr. Co. v. Jacksonville, T. & K. R. Co., 148 U.S. 373 (1893) 11

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) 22

Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936) 15, 30

Azzouka v. Sava, 777 F.2d 68 (2d Cir. 1985) 19

Balzac v. Porto Rico, 258 U.S. 298 (1922) 19

Brown v. Choate, 411 U.S. 452 (1973) 16

De Lima v. Bidwell, 182 U.S. 1 (1901) 19

Dorr v. United States, 195 U.S. 138 (1904) 19

Downes v. Bidwell, 182 U.S. 244 (1901) 19

Eaton v. City of Tulsa, 415 U.S. 647 . . . . . 29, 30

Frisby v. Schultz, 487 U.S. 474 (1988) 14

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 16

Page(s)

Haitian Refugee Center v. Baker, 789 F. Supp. 1552 (S.D. Fla. 1991), *injunction dissolved*, 949 F.2d 1109 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992) 26

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 10

Hansberry v. Lee, 311 U.S. 32 (1940) 25

House v. Mayo, 324 U.S. 42 (1945) 15

Johnson v. Eisentrager, 339 U.S. 763 (1950) 18, 21

Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) 21

Landon v. Plasencia, 459 U.S. 21 (1982) 20

McNary v. Haitian Centers Council, Inc., 112 S. Ct. 1714 (1992) 13

Montana v. Hall, 481 U.S. 401 (1987) 29

Montana v. United States, 440 U.S. 147 (1979) 25, 27

Nicosia v. Wall, 442 F.2d 1005 (5th Cir. 1971) 19

Nishimura Ekiu v. United States, 142 U.S. 651 (1892) 20

Page(s)

Parklane Hosiery Co. v. Shore, 439 U.S. 322 & n.7 (1979) 24

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 29

Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977) 19

Reid v. Covert, 354 U.S. 1, 53 (1957) 21, 22

Sale v. Haitian Centers Council, Inc., No. 92-344 (U.S. argued Mar. 2, 1993) 3, 10, 27, 30

Schweiker v. Hansen, 450 U.S. 785 (1981) 29

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 20

Stone v. Graham, 449 U.S. 39 (1980) 29

Straight v. Wainwright, 476 U.S. 1132 (1985) 28

United States v. Caltex, Inc., 344 U.S. 149 (1952) 22

United States v. General Motors Corp., 323 U.S. 373 (1945) 14

United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) 29

United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979) 19

Page(s)

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 14, 17, 21-23

Whalen v. Roe, 423 U.S. 1313, (1974) 13

Wyrick v. Fields, 459 U.S. 42 (1982) 30

Yiu Sing Chun v. Sava, 708 F.2d 869
(2d Cir. 1983) 19

Constitution, Treaty, Statutes

Executive Order No. 12,807,
57 Fed. Reg. 23,133 (1992) 3, 8

Fed. R. Civ. P. 15(b) 7

Immigration and Nationality Act § 243(h),
8 U.S.C. § 1253(h) 7, 8

United Nations Convention Relating to the
Status of Refugees, July 28, 1951,
19 U.S.T. 6259, 189 U.N.T.S. 150
[Article 33, 19 U.S.T. at 6275] 8, 28

U.S. Const. amend. I 6

U.S. Const. amend. IV 21, 22

U.S. Const. amend. V (Due Process Clause) . . . . . *passim*

Page(s)

Other Authorities

Restatement (Second) of Judgments
§ 28(5) (1982) 27

11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2947
(1992 Supp.) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-528

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *ET AL.*,

Petitioners,

-vs.-

HAITIAN CENTERS COUNCIL, INC., *ET AL.*,

Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY OF ARGUMENT

Respondents Haitian Centers Council, Inc., *et al.* oppose the petition for a writ of certiorari because the decision below was correct and warrants no further review, particularly in its current interlocutory posture. Petitioners seek review of a nonfinal order, decided on narrow fact-specific grounds, that presents no extraordinary issue, upon which the circuits are not divided, and that simply maintains the *status quo* pending a trial that will be completed before this Court can dispose of this petition. Petitioners concede that the district court's preliminary injunction, as modified on appeal, "does not require petitioners to grant respondent [Haitian Service] organizations immediate access to Guantanamo and affects for now only the several hundred screened-in Haitians at Guantanamo . . . who . . . await further interviews there." Pet. at

12.[1] Nor does the Second Circuit's decision require or even concern the entry into the United States of the 252 "screened-in" Haitians[2] who have been forcibly held in custody behind barbed wire on Guantanamo for as long as fifteen months, many of whom already have been found to have well-founded fears of political persecution. Rather, pending trial on the merits, petitioners are enjoined merely from interviewing respondent Haitians to determine whether to repatriate them to Haiti unless respondents are represented by attorneys during those interviews.

Although the Second Circuit rendered its decision ten months ago, petitioners have not sought a stay in either the Second Circuit or this Court. On March 8, 1993, a full trial on the issues raised in the petition, as well as other dispositive issues, began in the district court, and the factual record has now been dramatically expanded. The trial is scheduled to end on March 18. If respondents should win at trial and again on appeal, this Court can review that judgment on a fully developed record, thereby avoiding the needless review and piecemeal litigation that granting this petition would engender.

Furthermore, the lower courts were correct in finding sufficiently serious questions going to the merits that the Fifth Amendment Due Process Clause applies to "screened-in" Haitian aliens being held in custody on territory within the exclusive jurisdiction and control of the United States in connection with their efforts to avoid return to Haiti,[3] where they face political persecution.

---

1. "Pet." refers to the petition for a writ of certiorari in No. 92-528. "Pet. App." refers to the appendix to the petition in No. 92-344. "J.A." refers to the joint appendix in No. 92-344.

2. This is an approximate number. A small number of Haitians have been paroled into the United States from Guantanamo despite petitioners' general ban, because they either have proved HIV-negative and willing to separate from the HIV-positive members of their family or because they have required medical treatment that is unavailable on Guantanamo.

Even if the Court were inclined to grant review, this petition should be held and disposed of in light of the Court's ruling in *Sale v. Haitian Centers Council*, No. 92-344 (*HCC II*) (argued March 2, 1993). Petitioners concede "much commonality among the issues raised" in this petition and those to be decided in *HCC II*, Pet. at 28, thus rendering their own request for summary reversal completely inappropriate. Summary reversal is granted only in the most egregious cases and never when a related case is under plenary review. Summary reversal has no place where, as here, the decision below was correct, the law is not well-settled, and vital disputed facts remain to be decided at the trial.

STATEMENT

I. Background

This case concerns 252 "screened-in" Haitian refugees who have been held in petitioners' custody behind barbed wire for as long as fifteen months in a detention camp at the Guantanamo Naval Base. They fled Haiti in the period following the September 30, 1991 coup which ousted President Jean-Bertrand Aristide and prior to President Bush's May 24, 1992 issuance of Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992) ("Kennebunkport Order"), Pet. App. at 260a-263a (directing lower government officials to summarily repatriate all Haitians without any process or screening). Under the program in effect at the time respondents were interdicted, Haitians were interviewed, and those found to have a credible political asylum claim were "screened in" and brought to the United States where they could apply for asylum. Those found not to have a credible fear of political persecution were "screened out" and repatriated to Haiti.[3]

The Haitians involved in this case were "screened-in," but not brought to the United States. Pet. App. at 111a-14a; Pet. at 3. Instead, because respondents allegedly have a communicable

---

3. This litigation preceded respondents' challenge to the Kennebunkport Order, *HCC II*, upon which this Court heard oral argument on March 2, 1993.

disease, petitioners required Haitian respondents to pass a second uncounseled interview in order to avoid return to Haiti. In April, 1992, the district court entered a preliminary injunction to ensure that such uncounseled second interviews would not occur pending a trial on the merits.

II. *HRC v. Baker*

Haitians began fleeing political reprisals that followed the September 30, 1991 military coup that overthrew the government of President Aristide, the first democratically elected government of Haiti. Petitioners continued their long-standing policy of "screening out" and returning to Haiti interdicted Haitians who lacked credible fears of persecution, but began housing "screened-in" Haitians at the United States Naval Base at Guantanamo Bay pending their transfer to the United States. In November 1991, the Haitian Refugee Center ("HRC") brought a suit in the Southern District of Florida challenging the adequacy of the initial screening procedures. Plaintiffs included HRC itself and a class represented by fifteen named plaintiffs, all of whom had been "screened-out." *HRC*, Second Amended Compl. ¶¶ 7, 9-23, J.A. at 96, 97-104.

At that time, only Haitians who had been "screened-out" in the initial interview process were at risk of being forcibly returned to Haiti as a consequence of faulty INS screening procedures. Thus, the *HRC* class included only "screened-out" Haitians, *i.e.*, those persons who had suffered harm because of the alleged inadequacies in the initial screening.[4] To halt petitioners' conduct, the district

---

4. The fifteen named plaintiffs in *HRC* moved to certify a class consisting of all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights. *HRC* Class Cert. Motion, J.A. at 119. Their supporting memorandum made clear that

> [t]he individual plaintiffs . . . were intercepted by the United States Coast Guard pursuant to a 'program of interdiction' that permits interception and repatriation of undocumented

(continued...)

court issued several injunctions, which the Eleventh Circuit reversed in two separate rulings. Pet. App. at 171a-189a; *id.* at 190a-252a. In opposing certiorari in *HRC*, the Solicitor General specifically represented to this Court that

> Under current practice [followed for more than a decade], *any [screened-in] aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum* under section 208 (a) of the [INA]. . . . These "screened in" individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a "refugee" and otherwise qualify for the discretionary relief of asylum.

J.A. at 252 (emphasis added). Yet only five days after this Court denied certiorari in *HRC*, petitioners changed that practice, began reinterviewing certain of the "screened-in" Haitians on Guantanamo without lawyers, and moved to repatriate those "screened-in" Haitians who "failed" the new uncounseled procedures. This new practice was embodied in a February 29, 1992 memorandum from INS General Counsel Grover Joseph Rees, III, which mandated that "screened-in" Haitians with a communicable disease be given a second interview to determine if they have a "well founded fear of persecution on account of . . . political opinion." Pet. App. at 82. The memorandum stated that the interviews were to be "identical" or as "nearly so as possible" to asylum interviews in the United

---

4.(...continued)

> aliens. . . . They have all been 'screened out' . . . . Effectively, as a result, each of these plaintiffs would be forcibly returned to Haiti . . . were it not for the Court's order.

HRC Class Cert. Mem., J.A. at 126-127. Only Haitians who had been "screened-out" in the initial interview process were at risk of being forcibly returned to Haiti. The *HRC* defendants did not oppose the motion or respond to the Memorandum. Accordingly, the district court certified the class without a hearing or opinion. *HRC* Order of December 3, 1991. J.A. at 89.

States. Pet. App. at 83. However, unlike asylum applicants in the United States, "screened-in" Haitians subject to a second interview were denied all the procedural protections that ordinarily attend asylum processing in the United States, including access to an attorney. These events gave rise to the instant lawsuit.

III. *HCC I*

Respondents brought this action in March, 1992, in the Eastern District of New York (Johnson, J.) on behalf, *inter alia*, of "[a]ll Haitian citizens who have been or will be screened-in," *see* Plaintiffs' Notice of Motion for Provisional Class Cert., J.A. at 281, challenging petitioners' changed practice.[5] Respondents sought a preliminary order that no "screened-in" Haitian on Guantanamo could be reinterviewed or repatriated without counsel, pending a determination at trial of the new policy's legality. The complaint alleged seven different violations of law, four of which are currently being tried before the district court. The court is also hearing two additional claims not raised in the original complaint.[6]

---

5. Other plaintiffs included three "Haitian Service Organizations," legal and advocacy groups that sought to provide counsel and assistance to the "screened-in" Haitians being detained at Guantanamo.

6. The following six issues are currently being litigated in the district court:

(1) the content-based denial of plaintiff Haitian Service Organizations' First Amendment rights to communicate with the "screened-in" Haitians held on Guantanamo;

(2) the denial of the "screened-in" Haitians' constitutional rights to obtain and communicate with counsel in the newly implemented rescreening process on Guantanamo;

(3) petitioners' arbitrary and capricious action that was not in accordance with law in connection with, *inter alia*, petitioners' intimidating and coercing the screened-in Haitians and wrongfully denying their individual asylum claims;

(4) the denial of the "screened-in" Haitians' equal protection rights by creating a separate and unequal asylum process for Haitians only;

(continued...)

Thus, the right to counsel under the Due Process Clause—the only one of plaintiffs' claims that would be before this Court if it were to grant this petition—is only a very small piece of a much larger case.

On March 27, 1992, the district court issued a 23-page opinion granting a temporary restraining order requiring that the named "screened-in" Haitian plaintiffs be given immediate access to their lawyers and enjoining both uncounseled reinterviews on Guantanamo and repatriation of uncounseled class members. Pet. App. at 125a. On April 1, 1992, the district court conducted a full-day preliminary injunction hearing at which the parties offered extensive written evidence and oral testimony. On April 6, 1992, the court granted a preliminary injunction in a lengthy opinion, which contained detailed findings of fact, conclusions of law, and conditional certification of the "screened-in" Haitians on Guantanamo as a plaintiff class. Pet. App. at 142a.

The court found that "the balance [of hardships] tips decidedly in favor of Plaintiffs" and "that irreparable harm is likely to result if this preliminary injunction were [not] issued." Pet. App at 152a, 161a (*sic*). Specifically, the court determined that "[r]epatriated Haitians face political persecution and even death on their return," Pet. App. at 148a, and that there were serious questions going to the merits of respondents' First and Fifth Amendment claims, Pet. App. at 155a, 157a. The preliminary relief that Judge Johnson ordered—preventing the allegedly unlawful repatriation of screened-

---

6.(...continued)

(5) the denial of due process rights by detaining "screened-in" Haitians indefinitely; and,

(6) the denial of due process rights by confining "screened-in" Haitians in inherently unhealthful and life-threatening conditions.

Claims One through Four were contained in the complaint. J.A. at 31-35. The district court ruled from the bench on March 8, 1993 that pursuant to Fed. R. Civ. P. 15(b) Claims Five and Six also were to be considered at trial. In a previous ruling, the court postponed to a later trial respondents' challenge to the policy of summary return under 8 U.S.C. § 1253(h).

in Haitians and preventing respondent advocacy groups' First Amendment rights from being extinguished—was designed to preserve the *status quo* until the full case could be decided after discovery, on a developed record.

The Second Circuit affirmed, with modifications, the lower court's grant of a preliminary injunction. Pet. App. at 73a. However, the Second Circuit only enjoined petitioners from reinterviewing or repatriating screened-in Haitians who had not had an opportunity to consult with counsel. Unlike the district court, the Court of Appeals did not require petitioners to grant lawyers immediate access to their clients on Guantanamo. Instead, the modified injunction required attorney access only if petitioners elected to subject the "screened-in" Haitians to reinterviews that could result in repatriation to Haiti prior to trial. To minimize hardship to either party, the court specifically directed that the trial be expedited. Pet. App. at 117a.

IV. *HCC II*

On May 24, 1992, pursuant to the Kennebunkport Order issued by President Bush, petitioners dispensed with the legal obligations they had previously recognized not to return aliens to a country where such aliens' life or freedom would be threatened. Pet. App. at 260a. Instead, petitioners Coast Guard and Immigration and Naturalization Service ("INS") instituted a new interdiction program of summary return without screening, forcibly returning *bona fide* refugees, without any process or questioning, to conditions of persecution and death in Haiti.

On March 2, 1993, this Court heard oral argument regarding the Second Circuit's order directing the district court to enjoin petitioners' implementation of the Kennebunkport Order. The Court of Appeals reasoned that the summary return policy violates the plain language of § 243(h) of the Immigration and Nationality Act ("INA") and that the extraterritorial scope of § 243(h) conforms to both the plain language and object and purpose of Article 33.1 of the U.N. Refugee Convention. Pet. App. at 1a-39a.

The 252 "screened-in" Haitians held on Guantanamo, the subject of *HCC I*, were interdicted pursuant to the prior Executive Order. Thus, neither their separate claims concerning their plight on Guantanamo, nor the application of due process protections to aliens in respondents' situation, were before this Court in *HCC II*.

V. District court proceedings since the close of the record before the court of appeals

Pursuant to the Second Circuit's directive, the district court expedited the trial process in *HCC I*. In that regard, a trial on six separate claims raised by the "screened-in" Haitians held on Guantanamo began on March 8, 1993 and will have concluded before this Court has an opportunity to decide the instant petition.

The trial record will be far more complete than the evidence available to the parties at the time of the preliminary injunction hearing. The Second Circuit's ruling noted the need for a "fuller record" in order to decide the ultimate merits. Pet. App. at 109a. Accordingly, the parties have now taken more than forty depositions and produced thousands of documents to each other. Evidence presented to the district court at trial which was not available at the time of the preliminary injunction establishes, *inter alia*, that: (1) only U.S. criminal and civil laws apply on the Guantanamo Naval Base; (2) the screened-in Haitians have been subjected to indefinite confinement in a camp that the government's own health experts have called a potential public health disaster; and (3) "screened-in" Haitian refugees have not been medically evacuated even though the military doctors on Guantanamo believe they cannot be treated adequately there.

This and other evidence is currently under consideration by the district court, which will very likely make a determination regarding all of plaintiffs' claims before the Court disposes of this petition.

REASONS FOR DENYING THE WRIT

The writ should be denied because this case is currently on trial before the United States District Court for the Eastern District of New York. Review of the Second Circuit's fact-specific decision would be utterly premature and a waste of this Court's resources. Petitioners identify no issues of special importance warranting review at this stage, nor any issues on which the circuits are divided. Moreover, the decision below was correct, with regard to both the merits and preclusion. Even if the Court were inclined to consider the questions presented here, it should not grant this petition, but rather, should hold and dispose of it after resolution of *Sale v. Haitian Centers Council*, No. 92-344 (*HCC II*) (argued March 2, 1993). Petitioners' request for summary reversal is baseless, given that a related case is under plenary review, the decision below was correct, and the factual record has now been substantially developed at trial.

I. This Court should not review a fact-specific, nonfinal order that maintains the *status quo* when review will not decide all of the issues between the parties, particularly when a fuller record is now being made at trial.

Petitioners ask this Court to review a preliminary injunction, rendered on a unique set of facts, that retains the *status quo* pending the outcome of a full trial that is currently underway in the U.S. District Court in Brooklyn. This Court reviews interlocutory orders "sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258. For three reasons, this is not such a case.

First, the order upon which review is requested was based upon a unique set of facts that may well never recur.[7] Second, the preliminary injunction, which has been operative for ten months without the petitioners requesting a stay, is not overbroad, but carefully tailored to maintain the *status quo* pending the trial. Third, a plenary trial in this case began on March 8, 1993, and a full factual record has now been developed on both the legal issues relevant to the preliminary injunction as well as upon numerous additional claims that may prove dispositive of the case.

A. The preliminary injunction warrants no review by this Court at an interlocutory stage because it is "neither . . . important in its immediate effect, nor . . . far-reaching in its consequences." *American Constr. Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 373, 385-86 (1893). The instant case is highly fact-specific. The courts below made a preliminary determination that a small number of Haitians—who have been interdicted on the high seas, held in U.S. custody on Guantanamo Naval Base over which the U.S. exercises exclusive jurisdiction, "screened-in" under a policy that no longer exists, and determined to have a communicable disease—cannot be repatriated to Haiti while the trial on the merits proceeds, unless they are given access to counsel at their second interview. In affirming a modified preliminary injunction, the Court of Appeals recognized that, based on its "review of the unique facts and circumstances," there were sufficiently serious questions going

---

7. Nor need the Court review the order to "secure uniformity of decision." No circuit split exists on the narrow question here: whether the lower courts abused their discretion by finding sufficiently serious questions going to the merits that the Fifth Amendment Due Process Clause applies to non-accused, non-hostile, "screened-in" Haitian aliens being held in custody in territory within the exclusive jurisdiction and control of the United States in connection with their efforts to avoid return to Haiti where they face political persecution and even death. *See* Point II, *infra*.

to the merits that respondent Haitians have due process rights under these unique circumstances. Pet App. at 104a.[8]

B. The preliminary injunction, as modified by the Second Circuit, is narrowly tailored to preserve the *status quo*. Initially, the district court had granted respondent Haitian Service Organizations immediate access to their clients on Guantanamo, but the court of appeals vacated that portion of the order as going beyond the *status quo*. Pet. App. at 116a. The Second Circuit then limited the relief, enjoining petitioners merely from repatriating "screened-in" Haitians who were not first afforded an opportunity to communicate with counsel. Pet. App. at 116a-17a, 85a. Hence, respondent Haitian Service Organizations have no rights under the order to have access to their clients. Under the injunction, petitioners retain the power to repatriate "screened-out" Haitians; to keep "screened-in" Haitians outside the United States; and even to repatriate the "screened-in" Haitians who fail their second interviews, so long as they have had the assistance of counsel.[9]

---

8. Petitioners seek to broaden the impact of the preliminary injunction by arguing that it could limit the practical options available to them if they once again decide to interdict *and* screen refugees. Pet. at 27. But this is completely speculative, particularly considering that just a few days ago the government came before this Court in *HCC II* and defended the policy of summary return without screening as lawful. Such policy speculation does not create a reason for this Court to review an interlocutory order in the midst of an ongoing trial. Nor would the order limit petitioners' options except with regard to those relatively few "screened-in" Haitians with a communicable disease whom petitioners seek to subject to an uncounseled second interview. Petitioners' suggestion that the injunction impairs their freedom at sometime in the future to interdict, screen, and then have full refugee determinations on Guantanamo is not only speculative, but flatly inconsistent with their claim that the base cannot even accommodate a few attorneys to process the few respondent Haitians still held here.

9. Respondents falsely claim that "many migrants have expressed a strong preference to return to Haiti" and that the "Second Circuit's decision, however, may well bar such voluntary repatriations." Pet. at 13 n. 9. To the extent that anyone has supposedly expressed such a desire—and petitioners have notified

(continued...)

Nor is the limited injunction causing petitioners irreparable harm that would warrant this Court's short-circuiting an ongoing trial on the merits.[10] Both courts below recognized that the petitioners will suffer no real harm while the preliminary injunction is in place, pending the expedited trial. The Second Circuit recognized that petitioners could only claim vague interference with carrying out their responsibilities. Pet. App. at 116a-117a. Indeed, during the ten months the injunction has been in place, petitioners have not requested a stay. Pet. at 12-13. To the contrary, over that period, petitioners have voluntarily consented to visits to Guantanamo ranging from two days to two weeks by more than forty lawyers, law students, interpreters, and doctors retained by respondents.[11] Accordingly, this Court has no basis now to decide that the preliminary injunction is causing such harm to petitioners as to justify premature review of a nonfinal order.

To grant certiorari and reverse the order below would cause irreparable injury to respondents by returning many of them to Haiti. The Second Circuit expressly affirmed the district court's finding that repatriated Haitians "face political persecution and even death on their return." Pet. App. at 116a. This Court has granted

---

9.(...continued)
respondents of only three such persons—return to Haiti would not be blocked if respondents' counsel were convinced that the request for voluntary repatriation is genuine. In fact, all screened-in Haitians we know of have declined repatriation after interviews with counsel.

10. Petitioners do not argue—as they did to the Second Circuit, Brief for Appellants, No. 92-6090 at 15, that this limited order would dramatically increase the outflow of people from Haiti. Not only is the present order far more limited than the district court order which this Court stayed, *McNary v. Haitian Centers Council, Inc.*, 112 S. Ct. 1714 (1992), but the new Bush-Clinton policy of summary return has undercut any claim of increased outflow.

11. In order to successfully seek a stay, petitioners would have had to demonstrate to this Court that they "will suffer irreparable injury if the judgment is not stayed . . . pending appeal." *Whalen v. Roe*, 423 U.S. 1313, 1316 (1974) (Marshall, J.).

review of a nonfinal order only in the rare circumstances where it is "fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Here, by contrast, review and reversal would end the case despite the numerous new facts and legal issues now adduced by the district court, not because the legal issue decided here would dispose of those other issues, but because this Court's review would free petitioners to repatriate respondents to Haiti. Such a result would wholly undercut the most compelling reason for issuing a preliminary injunction in the first place: "to prevent the judicial process from being rendered futile by defendant's action or refusal to act." 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2947 (1992 Supp.).

C. It would be highly unusual, if not unprecedented, for this Court to grant certiorari to review a nonfinal order in a case in which a full trial is ongoing, during which new facts and additional legal claims are being raised and decided. Granting review would be particularly premature and unwarranted here, where the facts developed at trial will substantially aid this Court's determination. *Cf. Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (certiorari granted in part when further proceedings not likely to aid Supreme Court consideration).

The Second Circuit has demanded a "fuller record" from the district court, which the trial will provide. Pet. App. at 109a. For example, the Second Circuit's inquiry as to whether "United States civil laws apply to the conduct of all aliens on the base," Pet. App. at 109a, has now been answered affirmatively.[12] Deposition of Lt. Cmdr. Peter Straub (Judge Advocate General's Corps). Likewise, discovery and trial have established that providing counsel to the "screened-in" Haitians is both practicable and critically important

---

12. Such a finding might well prove crucial in deciding whether applying the Fifth Amendment would be either "impracticable" or "anomalous" in these circumstances. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring). *See* Point II, *infra*.

to prevent erroneous repatriations. Depositions of Col. Stephen Kinder (former camp commander), Deborah Anker (Lecturer, Harvard Law School), Scott Busby (Guantanamo Asylum Officer), and Grover Joseph Rees, III (INS General Counsel). Given the substantial depositions and trial testimony on these and other issues, it makes no sense, absent immediate harm to respondents, to grant the petition.

Ultimately, this case also may be decided on grounds not raised in the petition. Respondents have raised and proceeded to trial on six legal claims. This petition, however, raises only one of these, the due process claim.[13] *See* Statement, *supra*. One of the claims is statutory—that petitioners' decision to reinterview the "screened-in" Haitians was arbitrary and capricious—and could prove determinative, thereby eliminating the need for this Court to rule on the constitutional grounds presented in the petition. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'") (citations omitted).

Thus, granting certiorari here would improvidently thrust this Court into piecemeal litigation and spawn unnecessary decisions on constitutional questions. Denying certiorari, by contrast, will "import[] no expression of opinion upon the merits of the case," but will ensure that the lower courts and, if need be, this Court will ultimately review this case on a full, rather than fragmented, record. *House v. Mayo*, 324 U.S. 42, 48 (1945).

---

13. Indeed, the petition only concerns one aspect of that claim—the right of the "screened-in" Haitians to access to counsel prior to repatriation to Haiti. It does not concern other aspects of the due process claim that are currently before the district court, including the right to access to counsel for the purpose of challenging conditions of confinement and abuse while so confined.

II. The district court did not abuse its discretion by issuing the nonfinal order here, and the court of appeals properly affirmed that order as modified.

The court of appeals affirmed a narrowly drawn preliminary injunction tailored to maintain the *status quo*. Pending trial, the Second Circuit enjoined petitioners from repatriating to Haiti "screened-in" Haitians unless they were first provided access to counsel at their second interview. Both lower courts held that respondents would suffer irreparable injury if repatriated to Haiti,[14] and that the balance of hardships tips decidedly in respondents' favor. Pet. App. at 99a-117a; 152a-161a. Petitioners do not contest either conclusion. Even if respondents had not subsequently adduced ample evidence at trial to support these factual findings, under the "two-court rule," this Court should not disturb them. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Both lower courts further found sufficiently serious questions going to the merits of their claim that respondents—non-accused, non-hostile Haitians, who were interdicted fleeing Haiti, "screened-in," and held in custody on territory subject to exclusive U.S. jurisdiction and control—are entitled to due process in connection with their efforts to avoid erroneous return to persecution in Haiti.[15] In so ruling, the courts below did not abuse their discretion. Thus, certiorari is inappropriate. *Brown v. Choate*, 411 U.S. 452 (1973)

A. Petitioners fundamentally misstate the question presented as whether any and all aliens outside the United States have due

---

14. The district court concluded that the "screened-in" Haitians "may face torture [and] death if they lack access to counsel, fail in their bids to receive asylum, and are repatriated to Haiti." Pet. App. at 152a. The Second Circuit specifically affirmed that finding. Pet. App. at 99a, 117a.

15. The Second Circuit found, as did the district court, "that the plaintiffs . . . have met [the likelihood of success] standard as well." Pet. at 117a n.19.

process rights in connection with their attempts to enter the United States. Pet. at 15a-20a. Yet far from mandating due process rights for all aliens outside our borders seeking entry, the preliminary injunction protects a much narrower class of persons who are subject to a distinctively onerous set of government restraints, a much narrower territorial sphere, and a much narrower class of rights. As the Second Circuit carefully explained, its due process holding reaches only: (1) nonaccused, non-hostile Haitians (2) being held in United States custody (3) on territory within the exclusive jurisdiction and control of the United States, (4) who have been "screened-in" as having credible fears of persecution, and (5) who claim the right to due process rights only to avoid a distinctive loss of liberty, *i.e.*, return to Haiti, a country where they face death and persecution. After examining this set of "unique facts—the interdiction of plaintiffs by United States officials, the status of the territory upon which they are detained, and the 'credible' asylum claims they have already been found to possess," the Second Circuit found "that there were serious questions going to the merits" of respondents' due process claims. Pet. App. at 100a. By its terms, that holding has no application to the far broader set of persons, territory, and rights identified by petitioners' sweeping question presented. The Second Circuit carefully specified that "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory," quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990). Pet. App. at 108a. But the court found the Haitians were not that "limitless class," but an "identifiable group of people . . . who have been detained on territory that is subject to the exclusive control of the United States," have been "screened-in," and have a "reasonable expectation . . . in not being wrongly repatriated" to Haiti where they will suffer political persecution. Pet. App. at 108a, 113a. In our history, no other group of aliens has been similarly screened, while detained in U.S. custody on territory subject to comparable U.S. control, and thus been determined to have such an interest in

non-return. On that fact-specific ground, the Second Circuit held that the respondent "screened-in" Haitians were entitled to "some degree of due process protection" before U.S. officials return them to Haiti. Pet. App. at 114a.

Thus, observing that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is limited to the claim that the Due Process Clause does not apply to "convicted, enemy aliens" outside the sovereign territory of the United States, the court of appeals found "unanswered" the "serious questions" whether that clause applies to "non-accused, non-hostile aliens held incommunicado on a military base within the *exclusive* control of the United States, namely, Guantanamo Bay." Pet. App. at 107a (emphasis in original).

The court of appeals coupled this ruling with a finding that "United States citizens and aliens alike, charged with the commission of crimes on Guantanamo Bay, are prosecuted under United States laws." Pet. App. at 106a. The appeals court stated that a full record might demonstrate that "United States civil laws apply to the conduct of all aliens on the base," Pet. App. at 109a, a fact that respondents have now confirmed at trial. Thus, the court held there was "no principled basis for concluding that the 'screened in' plaintiffs detained at the base would have fewer substantive rights than these other aliens." Pet. App. at 109a.

Similarly, the court of appeals noted that the Fifth Amendment, which protects fundamental constitutional rights, "does not suggest" that it applies "only to areas fitting a circumscribed definition of the United States." Pet. App. at 107a. The Second Circuit pointed to the unique U.S. agreement with Cuba regarding Guantanamo, which states that "the United States shall exercise complete jurisdiction and control over and within said areas." Pet. App. at 105a. In comparable situations, such as the former Panama Canal Zone, the Trust Territory of the Pacific Islands, and the former American sector in Berlin, the courts have held fundamental

rights applicable to both aliens and citizens under the rationale of the *Insular Cases*.[16]

Finally, the court of appeals held that the Due Process Clause applies to "screened-in" Haitians on Guantanamo *because* their screened-in status recognizes their liberty interest in non-return. As the Second Circuit found, once the Haitians have been "screened-in," there is an alteration in their "fundamental legal and human rights status . . . vis-a-vis the United States government," implicating "the Agreement between the United States and Haiti, the Refugee Act of 1980, and the Protocol, to which we are a signatory," Pet. App. at 113a, all of which forbid the forcible return of refugees to conditions of persecution. These instruments impose a legal duty not to return persons who fear political persecution in their homeland, which in turn creates a liberty interest of which an individual cannot be divested without due process of law. *See Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983); *Azzouka v. Sava*, 777 F.2d 68 (2d Cir. 1985). By screening respondents in, the Second Circuit concluded, petitioners have altered their status, which means "that the process thereafter employed by the United States with respect to determining the aliens' 'refugee' status should accord with some degree of due process protection." Pet. App. at 113a-114a.

Having found the Due Process Clause applicable "based upon the unique facts and circumstances of this case," Pet. App. at 114a, the court of appeals appropriately concluded that "[p]ermitting access to attorneys is a reasonable method to insure that the 'screened-in' plaintiffs are not wrongly repatriated" to a country

---

16. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *See generally Nicosia v. Wall*, 442 F.2d 1005 (5th Cir. 1971) (government concedes that U.S. obligation of non-return under the Protocol Relating to the Status of Refugees applies in the Canal Zone); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) (fundamental constitutional rights extend to Trust Territory of the Pacific Islands); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979) (same for American sector in Berlin).

where they have been found to fear persecution. *Id.* At both the preliminary relief and trial stages of this case, respondents have demonstrated that counsel is essential to the process of guaranteeing that such wrongful returns do not occur.[17]

B. Against the Second Circuit's due process determination, petitioners claim, first, that aliens who are seeking admission to the United States have no rights under the Due Process Clause, Pet. at 14-19, and, second, that no constitutional provision ever protects unadmitted aliens outside the country. Pet. at 16.

Even if petitioners' first claim were true, it would have no bearing on this petition. Petitioners claim incorrectly that the courts below found that the "screened-in" Haitians have due process rights "in connection with their applications for admission." Pet. at 16.[18] Rather, the injunction affirmed by the Second Circuit merely protects respondents from being "wrongly repatriated to a country in which they have already been found by our government to have a credible fear of being persecuted." Pet. App. at 114a. The order does not require counseling with regard to questions of entry, only that "screened-in" Haitians have access to counsel before they are repatriated to Haiti from Guantanamo.

The distinction between entry and return also renders irrelevant the cases petitioners cite to demonstrate that aliens seeking to *enter* the country lack due process rights.[19] The injunction at issue here

---

17. The district court found, and the Second Circuit affirmed, that "the presence of attorneys during an asylum interview on Guantanamo would be useful, feasible, and would not interfere with the interview process." Pet. App. at 116a n. 17. The courts further found that the plaintiffs "may face torture [and] death if they lack access to counsel." Pet. App. at 99a.

18. *See also* Pet. at 14, 16, 17, 19.

19. The cases relied upon by petitioners, Pet. 15-16, such as *Landon v. Plasencia*, 459 U.S. 21 (1982); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); and *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), all concern claims of constitutional rights regarding admission. Hence, they cast no doubt upon the liberty interest in non-return being asserted by respondents.

is not based on any Haitian's liberty interest in gaining entry to the United States. The liberty interest, which the courts below found to implicate the Due Process Clause, lies solely in avoiding forced return to the persecution from which they were fleeing.

Petitioners secondly rely on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which held the Fourth Amendment inapplicable to warrantless searches of an alien's residence outside U.S. territory, to argue that the Fifth Amendment similarly has no application of any kind to unadmitted aliens. Yet *Verdugo* cannot be read so broadly. The *Verdugo* majority's only comment on the Fifth Amendment was its reference, 494 U.S. at 269, in *dicta*, to *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which involved the rights of enemy aliens in wartime on foreign soil.[20] As we have noted, respondents here are not enemy aliens, but rather, "screened-in" aliens whom petitioners themselves have determined to have credible fears of persecution if returned to Haiti. Nor are they detained exclusively on foreign soil, but at Guantanamo Bay, a unique enclave under exclusive U.S. jurisdiction, where the only law is United States law. Finally, this is manifestly not a wartime situation. Respondents' decision to flee their persecutors is neither a hostile nor a criminal act, but rather, an exercise of their universally recognized human rights.

Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* placed particular emphasis on the Fourth Amendment's reference to a right "of the people," a phrase he construed to require some connection with the United States. 494 U.S. at 264-65. The Fifth Amendment,

---

20. To the extent *Eisentrager* stands for a geographically restricted approach to the Bill of Rights, it was repudiated in *Reid v. Covert*, 354 U.S. 1, 53, 75 (1957) and *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). In his concurrence in *Reid*, Justice Harlan assessed the "particular circumstances of [the] particular case," to determine extraterritorial application of the Constitution. 354 U.S. at 75. Justice Harlan's particularized approach was adopted by Justice Kennedy's concurrence in *Verdugo-Urquidez*, 494 U.S. at 275-78, and used by the Second Circuit in analyzing the rights of respondents, Pet. App. at 104a-09a.

by contrast, protects "persons," a term that encompasses a more expansive class than those whom the Chief Justice believed were protected by the Fourth Amendment. Justice Kennedy's decisive concurring opinion applied the approach of Justice Harlan in *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring in the result), arguing that the extraterritorial application of the Bill of Rights should be determined by a contextual case-by-case analysis to determine whether adherence to a specific constitutional guarantee would be "impracticable and anomalous." 494 U.S. at 277-78 (Kennedy, J., concurring).

Thus, *Verdugo*'s narrow holding—the ground actually supported by a five-member majority of the Court—is that the government can rebut the application of a constitutional provision to the acts of the U.S. government outside U.S. territory by demonstrating that adherence to that provision in a particular circumstance would be "impracticable and anomalous." 494 U.S. at 278.[21] In this case, it would be anomalous *not* to extend the Due Process Clause to respondents who are non-hostile, "screened-in" aliens who have been held for over a year in U.S custody in territory subject to the exclusive jurisdiction and control of the United States.[22] As the Second Circuit concluded,

> applying the Fifth Amendment would not appear to be either "impracticable" or "anomalous" since the United States has exclusive control over Guantanamo Bay, and given the undisputed applicability of federal criminal laws to incidents that occur there and the apparent familiarity of the governmental personnel at the base with the

---

21. Applying Justice Harlan's analysis, Justice Kennedy concluded that it would be impracticable or anomalous to apply the fourth amendment's warrant clause to the search of a nonresident alien's home located abroad. 494 U.S. at 278.

22. This Court has recognized Fifth and Fourteenth Amendment due process protections for aliens on foreign soil. *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108 (1987); *United States v. Caltex, Inc.*, 344 U.S. 149 (1952).

> guarantees of due process, fundamental fairness and humane treatment that this country purports to afford to all persons.

Pet. App. at 108a-09a.[23] Given this straightforward, fact-bound application of *Verdugo*'s holding, the court of appeals did not abuse its discretion by determining that respondents presented serious questions going to the merits regarding the application of due process protections to ensure that "screened-in" Haitians are not wrongfully returned to their persecutors.

III. The courts below did not abuse their discretion by holding that the Eleventh Circuit's ruling barring "screened-out" Haitians from challenging initial INS screening procedures did not collaterally estop "screened-in" Haitians from challenging a new government practice of reinterviewing "screened-in" Haitians on Guantanamo without legal counsel and forcibly repatriating them to Haiti.

Petitioners additionally raise a preclusion argument that was rejected below by six of the seven judges who have considered it:[24] that the doctrine of *collateral estoppel* prohibits adjudication of "screened-in" respondents' Fifth Amendment due process claim. Petitioners nowhere claim that the Second Circuit broke new

---

23. As the Second Circuit explained:

> It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of the United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States.

Pet. App. at 108a.

24. *See* Pet. App. at 149a-152a (Johnson, J.); *id.* at 86a-96a (*HCC I*) (Pierce & Cardamone, JJ.); *id.* at 7a-14a (*HCC II*) (Pratt & Newman, JJ.); *id.* at 40a-41a (*HCC II*) (Newman & Pratt, JJ.). Without questioning the majority's rejection of petitioners' collateral estoppel claim in *HCC I*, Judge Mahoney implicitly accepted it en route to dissenting on the merits. *See id.* at 118a-124a (Mahoney, J.).

ground in collateral estoppel law or that the estoppel ruling below created or exacerbated any circuit split. Nevertheless, they ask this Court to deny respondents their day in court even though: (1) respondents were not parties to Eleventh Circuit's decision in *HRC v. Baker*, because they were "screened-in" at that time and suffered no harm as a result of the screening procedures then in effect; (2) the general due process issue was neither actually litigated nor necessarily determined by the Eleventh Circuit in *Baker*; and (3) the specific legal issues relevant to respondents' due process claim could not have been addressed in *Baker*, because the government had not yet implemented its new rescreening policy for HIV-positive Haitians.

A. "Screened-in" refugee plaintiffs were not parties to *HRC v. Baker*.

It is settled law that one cannot be bound by a prior judgment unless one was either a party to, or represented by a privy in, the prior action. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 & n.7 (1979). As the courts below have repeatedly held, the "screened-out" plaintiff class certified in *HRC* did not represent the "screened-in" plaintiff class that has been conditionally certified in this case. As such, "screened-in" plaintiffs were not parties to that litigation and so cannot be held to be collaterally estopped by it.

The plaintiff class in *HRC* included only "screened-out" Haitians. The fifteen named plaintiffs "ha[d] all been 'screened out.'" Class Cert. Mem., J.A. 126; Second Amended Compl., J.A. 94-104. According to plaintiffs' definition of the class, the legal issues shared by the named plaintiffs all involved denial of procedural rights during the *initial screening process*. Class Cert. Mem., J.A. 126-27. Each member of the proposed class claimed "deprivation of his/her rights based on virtually identical actions" by the INS. *Id.* at 6. The plaintiff class was thus composed solely of persons who had been harmed by allegedly inadequate initial screening procedures, i.e., the "screened-out" Haitians.

Moreover, the Second Circuit correctly noted that the plaintiff class in *HRC* was improperly overbroad if it included both

"screened-in" and "screened-out" Haitians, because the two groups had interests antagonistic to one another. Pet. App. at 93a-94a. The screened-out Haitians in *HRC* were forcibly repatriated as a result of the initial screening process. Thus, of necessity, they attacked the legitimacy of the initial screening process. In contrast, the "screened-in" Haitians in this case would not have wanted to attack the initial screening process because they benefitted from that process by being screened in.[25]

B. The due process issue was neither actually litigated before, nor necessarily determined by, the Eleventh Circuit.

Even assuming *arguendo* that the screened-in Haitians were properly included in the plaintiff class certified in *HRC*, respondents' Fifth Amendment due process claim cannot be barred because the *HRC* court never rendered a final ruling on the merits of the Fifth Amendment claim in that case. In order for further adjudication of an issue to be deemed collaterally estopped, the question must have been "actually and necessarily determined by a court of competent jurisdiction" in a prior judgment. *Montana v. United States*, 440 U.S. 147, 153 (1979). The Fifth Amendment cause of action pleaded in *HRC* was not necessarily determined.

The *HRC* complaint mentioned the Fifth Amendment only once, in a list of eleven possible bases for relief. J.A. 117. Aside from this brief mention in the complaint, the litigants ignored the claim and at no point briefed the issue. Nor was the claim ever adjudicated on the merits. In its preliminary injunction order, the district court commented on this claim (and five others) only in passing, stating:

> With respect to plaintiffs' remaining claims . . . *without, of course, adjudicating the claims on the*

---

25. "[A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

> *merits*, we find no substantial likelihood that the rights asserted are judicially enforceable *under the present circumstances*.

Haitian Refugee Center v. Baker, 789 F. Supp. 1552, 1574 (S.D. Fla. 1991), *injunction dissolved*, 949 F.2d 1109 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992) (emphasis added). Because the district court subsequently entered the injunction on other grounds, *HRC* plaintiffs did not appeal this ruling. Thus, when the Eleventh Circuit later addressed the district court's comment in dicta, and without citation to any legal authority, Pet. App. at 200a, like the district court, it lacked the benefit of any briefing or argumentation by the Haitians whose rights allegedly had been infringed. Such a casual ruling cannot equitably preclude all other interdicted Haitians from ever raising a due process claim.

C. Plaintiffs' Fifth Amendment claim differs from that alleged by the *HRC* plaintiffs and only arose after *HRC* was decided

Finally, even assuming *arguendo* that the plaintiff classes were the same and that the Eleventh Circuit actually determined the Fifth Amendment issues raised in *HRC*, respondents' Fifth Amendment claim still would not be collaterally estopped here. The Fifth Amendment claim here arose from changed circumstances post-dating the *HRC* case and raises a different legal issue from that addressed in *HRC*. Because this difference is of constitutional import and the instant claim could not have been brought in *HRC* itself, the Second Circuit could not be barred from adjudicating instant plaintiffs' due process claim.

The *HRC* plaintiffs' suit challenged the sufficiency of the procedures used by the INS in its initial screenings. *See HRC v. Baker*, 789 F. Supp. at 1552. Their claim thus would have posed the question whether the Due Process Clause limits the way the government may screen all non-resident aliens interdicted outside of the territorial United States. In contrast, respondents challenge the INS' policy of subjecting *already "screened-in"* refugees, who have been found to possess credible fears of persecution, to *final*

de facto asylum adjudications on Guantanamo without access to counsel or other procedural protections, a policy not announced until five days after this Court denied certiorari in *HRC*. Even after being told by U.S. government officials that they would be taken to the United States, respondents have been detained for more than a year, on territory subject to the United States' exclusive jurisdiction and control, by these same officials. This case thus poses the novel question whether such persons have constitutionally protected liberty interests not otherwise enjoyed by unscreened refugees—interests of which respondents cannot then be deprived except through a constitutionally adequate procedure, one hallmark of which is the right to counsel.

As this Court has stated, "[c]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 159 (1979). Moreover, collateral estoppel will not apply if "[t]here is a clear and convincing need for a new determination of the issues. . . (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action." Restatement (Second) of Judgments § 28(5) (1982). The Fifth Amendment claim asserted here simply could not have been raised in the *HRC* litigation because the screened-in Haitians' claim targets a post-*HRC* government practice in a setting raising a different Fifth Amendment issue from that decided in *HRC*. Thus, collateral estoppel can pose no bar to the district court's adjudication of the Fifth Amendment claim.

IV. Alternatively, the petition should be held and disposed of in light of no. 92-344, *Sale v. Haitian Centers Council, Inc.*; under no scenario would the remedy of summary reversal be appropriate.

A. Petitioners propose that the Court "may wish to consider holding this petition pending" the decision in *Sale v. Haitian Centers Council*, No. 92-344 (argued March 2, 1993), because "there is much commonality among the issues" in the two cases.

Pet. at 28. Petitioners argue in No. 92-344 that Article 33.1 of the U.N. Convention and 8 U.S.C. § 1253(h) are inapplicable to aliens outside the United States and that if the Court agrees, its ruling would undercut the Second Circuit's decision here that the "screened-in" respondents have a "protectable liberty interest." Pet. at 28. We dispute that a decision from this Court in *HCC II* finding Article 33.1 and section 1253(h) somehow inapplicable to Coast Guard interdictions on the high seas would materially affect respondents' due process right to attorneys prior to their repatriation from Guantanamo to Haiti by direct action of the Attorney General. However, it is petitioners who not only request certiorari, but also emphasize the instant petition's relationship to No. 92-344. "A vote to 'hold' is a statement . . . that the disposition of the granted case may have an effect on the merits of the case which is to be held." *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1985) (Brennan, J., dissenting). Thus, even if this Court were inclined to examine the Second Circuit's decision further, it should do no more than hold this petition pending its plenary decision in No. 92-344.

Petitioners further suggest a hold so that the Court may consider, in light of its decision in No. 92-344, their claims that "collateral estoppel bars [the interdictees'] due process claim in light of the *HRC* district court's holding," Pet. 28-29. Although we plainly are not collaterally estopped by *HRC*, *see* point III, *supra*, the issue of collateral estoppel has been briefed and argued in No. 92-344, and the Court's decision there could clarify the issue now raised by petitioners. Rather than hold the petition solely for the collateral estoppel issue, however, the better course still would be to deny certiorari. Should the Court later wish to review the issues in this case, it could do so later, after a full record has been developed in the ongoing trial and the full range of legal issues has been determined at trial.

B. Nor, finally, is there any merit whatsoever in petitioners' arrogant request for summary reversal. Pet. at 22. As petitioners themselves argue, two of the issues they ask this Court to review share "commonality" with those awaiting decision in No. 92-344.

Summary reversals by this Court are strongly disfavored. *See, e.g., Pennsylvania v. Mimms*, 434 U.S. 106, 114 (1977) (Marshall, J., dissenting).[26] This Court has never granted summary reversal when it has *sub judice* matters that will affect the correctness of the very decision whose summary reversal is urged.

In any event, summary reversal is an extraordinary and exceptional disposition reserved "for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly erroneous." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). None of these prerequisites has been met here. The fact that some of these very issues are under review by the Court in No. 92-344 proves conclusively that the relevant law is neither settled nor stable.[27] Additional facts relevant to the issuance of a preliminary injunction—*e.g.*, the applicable law on Guantanamo—are under consideration at the ongoing trial in the district court. Petitioners have not cited any decision with which the Second Circuit's ruling, properly

---

26. *See also Eaton v. City of Tulsa*, 415 U.S. 647, 707 (Rehnquist, J., dissenting) ("I have no doubt that a majority of this Court would refuse to reverse . . . if it had a full record before it . . . ."); *Montana v. Hall*, 481 U.S. 401, 405 (1987) (Marshall, J., dissenting); *Stone v. Graham*, 449 U.S. 39, 47 (1980) (Rehnquist, J., dissenting) (condemning "cavalier summary reversal, without benefit of oral argument or briefs on the merits"); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 271-72 (1982) (Blackmun, J., dissenting) (summary reversal "deprives respondents of their 'day in court' in a singularly inappropriate manner," and "demeans the Court and its work and surely tends to lessen the quality of its legal product").

27. Summary reversal is particularly improper "in a case that involves a significant issue not settled by [the Court's] prior decisions." *Wyrick v. Fields*, 459 U.S. 42, 52 (1982) (Marshall, J., dissenting). Summary reversal would also likely involve the Court in reaching the merits of the constitutional due process issue, despite petitioners' claim that the Court should not reach that issue because collateral estoppel bars this litigation. Under the rule in *Ashwander v. Tennessee*, 297 U.S. 288, 323 (1936) (Brandeis, J., concurring), the Court should consider the collateral estoppel issue before addressing the constitutional issue. Accordingly, the Court should hold the petition, pending decision of the collateral estoppel issue in No. 92-344.

understood, clearly conflicts. Finally, far from being clearly erroneous, the lower courts' grant of the preliminary injunction was correct. Particularly when constitutional questions are at stake, summary reversal "should be reserved for palpably clear cases of constitutional error," *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting), a test plainly not met here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Even if the Court is inclined to consider the questions presented here, it should not grant and reverse summarily, but rather, should hold the petition pending final disposition of *Sale v. Haitian Centers Council, Inc.*, No. 92-344.

Respectfully submitted.

HAROLD HONGJU KOH
Lowenstein International
Human Rights Clinic
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4932

JOSEPH TRINGALI
SUSAN SAWYER
Simpson, Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

ROBERT RUBIN
IGNATIUS BAU
National Refugee Rights Project
Lawyers' Committee for Civil
Rights of the Bay Area
301 Mission Street
Suite 400
San Francisco, California 94105
(415) 543-9444

*MICHAEL RATNER
SUZANNE SHENDE
Center for Constitutional Rights
666 Broadway, 7th Fl.
New York, New York 10012
(212) 614-6485

LUCAS GUTTENTAG
JUDY RABINOVITZ
Immigrants' Rights Project
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for the Respondents

*Counsel of Record

On the Brief

J.D. Candidates,
Yale Law School:
Melinda Amiotte
Victoria Clawson
Lisa Daugaard
Margareth Etienne
Carl Goldfarb
Adam Gutride
Laura Ho
Stephen Roos
Veronique Sanchez
W. Todd Thomas
Cecilia Wang
Jonathan Weisglass
Michael Wishnie

Supreme Court, U.S.
FILED
JUN 15 1993
OFFICE OF THE CLERK

No. 92-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *ET AL.*,

Petitioners,

vs.

HAITIAN CENTERS COUNCIL, INC., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS

HAROLD HONGJU KOH
Lowenstein International Human Rights Clinic
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4932

*MICHAEL D. RATNER
SUZANNE SHENDE
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6464

LUCAS GUTTENTAG
JUDY RABINOVITZ
Immigrants' Rights Project
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

JOSEPH TRINGALI
SUSAN SAWYER
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

ROBERT RUBIN
IGNATIUS BAU
National Refugee Rights Project
Lawyers' Committee for Civil Rights of the Bay Area
301 Mission Street
San Francisco, California 94105
(415) 543-9444

Attorneys for Respondents

**Counsel of Record*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NO. 92-528

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

vs.

HAITIAN CENTERS COUNCIL, INC., ET AL.,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Haitian Centers Council, Inc., *et al.*, submit this supplemental brief pursuant to Rule 15.7 to inform the Court of the memorandum and order in this case issued on June 8, 1993, by Judge Sterling Johnson, Jr. of the United States District Court for the Eastern District of New York. That memorandum and order, reproduced in the appendix to this brief ("App."), followed the extensive two-week trial described in more detail in our opposition to certiorari. The June 8 order grants respondents permanent injunctive relief in lieu of the preliminary injunction previously ordered by the District Court and affirmed by the Second Circuit.

The Solicitor General filed the instant petition asking the Court to review and summarily reverse the Second Circuit's decision regarding the preliminary injunction. We believe that that petition is currently being held, pending the outcome in No. 92-344, *Sale v. Haitian Centers Council, Inc.*, which was argued on March 2, 1993.

The District Court's issuance of a permanent injunction in this case dissolves the preliminary injunction which formed the basis of this suit, and renders moot any effort by the Justice Department to seek further review of that injunction in this Court. On June 9, 1993, the Justice Department announced that it would not seek a stay of the permanent injunction. Given that the preliminary injunction has now been superseded by an opinion that rests prominently on nonconstitutional grounds,[1] it would be both pointless and beyond the Court's jurisdiction to grant review in order to issue an advisory opinion regarding the Second Circuit's decision affirming the preliminary injunction.

---

1. The Second Circuit's decision at issue here ruled that the District Court had not abused its discretion by issuing the preliminary injunction based on a finding that there were sufficiently serious questions that petitioners had violated Haitian respondents' due process rights. The District Court's June 8 opinion ruled for respondents not only on due process grounds, but also on statutory and First Amendment grounds that were not passed upon by the Second Circuit in this case.

For these reasons, and for those detailed in our opposition to certiorari, we therefore request that the Court take immediate action to relist this petition and to deny the Solicitor General's petition for a writ of certiorari.

Respectfully submitted,

HAROLD HONGJU KOH
Lowenstein International
Human Rights Clinic
Allard K. Lowenstein
International Human Rights
Law Project
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4932

JOSEPH F. TRINGALI
SUSAN SAWYER
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

LUCAS GUTTENTAG
JUDY RABINOVITZ
Immigrants' Rights Project
American Civil Liberties
Union
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

MICHAEL RATNER*
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6464

ROBERT RUBIN
IGNATIUS BAU
National Refugee Rights Project
Lawyers' Committee for Civil Rights of
the San Francisco Bay Area
301 Mission Street, Suite 400
San Francisco, California 94105
(415) 543-9444

Attorneys for Respondents
**Counsel of Record*

APPENDIX

92 CV 1258(SJ)

United States District Court

Eastern District of New York

HAITIAN CENTERS COUNCIL, INC., NATIONAL COALITION FOR HAITIAN REFUGEES, INC., IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL ORGANIZATION OF NEW HAVEN, CONNECTICUT; DR. FRANTZ GUERRIER, MILOT BAPTISTE, KENNEDY AUGUSTIN, and YOLANDE JEAN, on behalf of the themselves and all others similar situated; LENER MICLIS and CLAUD KENOL, on behalf of themselves and all others similar situated

Plaintiffs,

against

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE; JANET RENO, ATTORNEY GENERAL; IMMIGRATION AND NATURALIZATION SERVICE; WARREN CHRISTOPHER, SECRETARY OF STATE; REAR ADMIRAL ROBERT KRAMEK AND ADMIRAL KIME, COMMANDANTS, UNITED STATES COAST GUARD; AND COMMANDER, U.S. NAVAL BASE, GUANTANAMO BAY,

Defendants.

MEMORANDUM AND ORDER

APPEARANCES:

For the Plaintiffs:

MICHAEL RATNER*
SUZANNE SHENDE
Center for Constitutional Rights
666 Broadway
New York, New York 10012

LUCAS GUTTENTAG
JUDY RABINOVITZ
American Civil Liberties Union
Immigrants' Rights Project
132 W. 43rd Street
New York, New York 10036

ROBERT RUBIN
IGNATIUS BAU
National Refugee Rights Project
Lawyers' Committee for Civil
Rights of the San Francisco
Bay Area
301 Mission Street, Suite 400
San Francisco, California 94105

JOSEPH F. TRINGALI
SUSAN SAWYER
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017

HAROLD HONGJU KOH
Lowenstein International
Human Rights Clinic
127 Wall Street
New Haven, Connecuticut
06520

For the Defendants:

STUART SCHIFFER
Acting Assistant Attorney
General, Civil Division

ROBERT BOMBAUGH
Director of Immigration
Litigation

LAURI STEVEN FILPPU
Office of Immigration
Litigation

DAVID J. KLINE
CHARLES PAZAR
ELLEN SUE SHAPIRO
Attorneys
Office of Immigration
Litigation
Department of Justice
Box 878, Ben Franklin
Station
Washington, D.C. 20044-
0878

ZACHARY CARTER
United States Attorney
One Pierrepont Plaza
Brooklyn, New York 11201

SCOTT DUNN
Special Assistant U.S.
Attorney

ROBERT BEGLEITTER
Assistant U.S. Attorney

INTRODUCTION

The Parties

The Plaintiffs are the Haitian Centers Council, Inc., National Coalition for Haitian Refugees, Inc., Immigration Law Clinic of the Jerome N. Frank Legal Organization of New Haven Connecticut (hereinafter "Haitian Service Organizations"); Dr. Frantz Guerrier, Milot Baptiste, Kennedy Augustin, and Yolande Jean (hereinafter "Screened In Plaintiffs" or "Haitian detainees"); and Lener Miclis and Claud Kenol (hereinafter "Immediate Relative Plaintiffs"). The Defendants are Chris Sale, Acting Commissioner, Immigration and Naturalization Service; Janet Reno, Attorney General, Immigration and Naturalization Service; Warren Christopher, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay (collectively the "Government").

Prior Proceedings

In March 1992, Plaintiffs commenced this class action seeking declaratory and injunctive relief arising from the Government's actions against Haitian detainees and Haitian Service Organizations following the military coup that overthrew the government of Jean-Bertrand Aristide on September 30, 1991. The Original Complaint alleged *inter alia* that the Government had violated the Haitian Service Organization's First Amendment right of access to their clients on Guantanamo, the Haitian detainees' statutory and constitutional due process right to counsel, the Administrative Procedure Act ("APA") and various international treaties, bilateral agreements and executive orders. The Court issued a temporary restraining order ("TRO") on March 27, 1992 enjoining the Defendants' conduct.

Five days later the Court held a hearing on Plaintiffs' application for a preliminary injunction. On April 6, 1992, the Court issued a preliminary injunction after finding that the Plaintiffs had made a showing of irreparable harm and a likelihood of success on the merits. The court specifically concluded that: 1) the Government's denial of access to the Haitian Service Organization appeared to be a content based restriction on speech; 2) the statutory right to counsel under 8 U.S.C. § 1362 and 8 C.F.R. § 208.9 did not extend to the Haitian aliens being detained on Guantanamo; and 3) the Screened In Plaintiffs[1] were entitled to the protection of the Fifth Amendment. In addition, the Court ruled that the Screened Out Plaintiffs[2] represented by Iris Vilnor were bound by the outcome of *Haitian Refugee Center, Inc. v. Baker.*[3]

The Government filed an appeal from this Court's April 15, 1992 order clarifying the relief granted in its April 6, 1992 Memorandum and Order on April 18, 1992. Four days later the Supreme Court granted the Government's application for a stay of this order pending the Second Circuit's disposition of the appeal. On June 10, 1992, the Second Circuit affirmed and modified this Court's April 6th preliminary injunction in *Haitian Centers Council Inc. v. McNary* 969 F.2d 1326 (2d Cir. 1992). Without addressing the First Amendment claim of the Haitian Service Organizations, the Court of Appeals agreed that there were serious questions going to the merits of the Screened In Plaintiffs' Fifth Amendment claims.

While awaiting a decision from the Second Circuit on the appeal from the first injunction, the Government substantially

---

1. Plaintiffs who have been found to have a credible fear of return.
2. Plaintiffs who have been found to have no credible fear of return.
3. 789 F. Supp. 1552 (S.D. Fla. 1991), *rev'd by* 949 F.2d 1109 (11th Cir. 1991) *(en banc), rehearing denied by* 954 F.2d 731 (11th Cir. 1992) *cert. denied by* 112 S.Ct. 1992.

altered its policy toward Haitian refugees fleeing the political upheaval in Haiti. On May 24, 1992, the President issued an Executive Order ("Kennebunkport Order") directing the United States Coast Guard to return any Haitian interdicted beyond the territorial waters of the United States directly to Haiti without being afforded the opportunity to undergo INS refugee screening. Plaintiffs quickly moved by Order to Show Cause for a TRO pursuant to Fed. R. Civ. P. 65 restraining the Government from acting pursuant to the May 24th Executive Order.

At a hearing on May 29, 1992, the Plaintiffs argued that the new policy violated Section 243(h) of the INA, Article 33 of the United Nations Convention relating to the Status of Refugees and the 1981 U.S.-Haiti Executive Agreement. On June 6, 1992, the court denied Plaintiffs' application for a preliminary injunction. The Plaintiffs immediately appealed to the Second Circuit Court of Appeals. On July 29, 1992, the Court of Appeals reversed this Court's June 6th order denying a preliminary injunction finding that the language of § 243(h) of the INA imposes a mandatory duty upon the United States not to return aliens to their persecutors, no matter where in the world those actions are taken. *Haitian Centers Council Inc. et. al. v. McNary*, 969 F.2d 1350 (2d Cir. 1992). This Court immediately issued an injunction pursuant to the Second Circuit mandate. On August 1, 1992, the Supreme Court granted the Government's application for a stay pending filing of a petition of a writ of certiorari. The Supreme Court granted the Government's petition seeking certiorari in *McNary v. Haitian Centers Council, Inc.*, 113 S.Ct. 52 (1992), and recently heard oral argument on this question.

Trial on Guantanamo Case

In September 1992, the parties appeared at a pre-trial conference. The Plaintiffs made an oral application for a bifurcated

trial pursuant to Rule 42(b). The Court granted the Plaintiffs' motion concluding that bifurcation of the Guantanamo case and the Executive Order case was appropriate in light of the fact that the Supreme Court had granted the Government's petition for certiorari and was likely to dispose of the issue within the next few months. On the eve of trial, the Government made a motion *in limine* regarding claims not in the Original Complaint. Specifically, the Defendants asked the Court to preclude Plaintiffs from (1) presenting any evidence about camp conditions, (2) presenting evidence on medical issues raised by the detention of HIV+ Haitians at Guantanamo and (3) presenting evidence relating to an attack on the HIV ground for exclusion of aliens. After reviewing the Original Complaint and the Contention Interrogatories submitted, the Court agreed with the Government that many of the Due Process Claims mentioned in the Contention Interrogatories were not contained in the Original Complaint. Rather than granting a continuance, the Court began taking testimony and granted the Plaintiffs leave to amend the Original Complaint under Rule 15(b).

The Court conducted a bench trial on March 8-12, 15-19, and 25, 1993. Plaintiffs filed an Amended Complaint stating the following causes of action: (1) denial of the Haitian Service Organizations' First Amendment rights to provide advocacy and counselling to their clients detained on Guantanamo; (2) denial of the Haitian detainees' First and Fifth Amendment constitutional rights to obtain and communicate with counsel; (3) denial of the Haitian detainees' constitutional due process right to adequate medical care, to be free of indefinite detention and arbitrary punishment; (4) failure of the Government to follow rulemaking

procedures;[4] (5) arbitrary and capricious agency action not in accordance with the law; (6) judicial enforceability of the duty of non-refoulement; and (7) equal protection. At the close of trial, the parties submitted Proposed Findings of Fact and Conclusions of Law which have been adopted and incorporated in part in the Court's findings below.

STATEMENT OF FACTS

In 1981, the United States commenced the Alien Migration Interdiction Operation ("AMIO"), formerly known as the Haitian Migrant Interdiction Operation. A cooperative agreement between the United States and Haiti dated September 23, 1981 ("Haiti-U.S. Agreement") allows the United States Coast Guard ("Coast Guard") to board Haitian-flagged vessels on the high seas in order to inquire into the condition and destination of the vessel and the status of those on board. While the Agreement explicitly provides that the "United States does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to quality for refugee status," a vessel and its passengers were subject to return or repatriation to Haiti if the Coast Guard determined that a violation of United States or Haitian law had occurred. Between 1981 and 1991, the United States interdicted approximately 25,000 Haitians. The United States conducted refugee or asylum prescreening aboard Coast Guard cutters for interdicted Haitians as well as for interdicted nationals of 39 other countries including the

---

4. In November 1992, the Court dismissed the rulemaking claim pursuant to Rule 12(b)(6). Plaintiffs moved for reargument under Local Rule 3(j). A motion for reargument may be granted "only where the court has overlooked matters or controlling decisions which might have materially influenced the earlier decision". *Caleb & Co. v. E.I. Dupont de Nemours & Co.*, 624 F.Supp. 747, 748 (S.D.N.Y. 1985). After reviewing the briefs submitted on this motion, the Court finds that the Plaintiffs failed to meet the standard for granting reargument and will issue a separate order denying the motion.

Dominican Republic, the Bahamas, Pakistan, Iran, India, Colombia, and Chile during that period.

On September 30, 1991, Jean Bertrand Aristide ("Aristide"), the first democratically elected president in Haiti's history, was overthrown in a military coup. Fearing political persecution, thousands of Haitians fled the country by crossing the border into the Dominican Republic or taking to the high seas. Within a month of the coup, a large number of overcrowded, unseaworthy boats began departing from Haiti and the United States Coast Guard began interdicting an increasing number of such vessels in international waters.

Prior to interdicting a vessel, the Coast Guard inquired about the vessel's destination. Except when effecting a rescue at sea, the Coast Guard would not remove the passengers or master of a Haitian boat unless it was determined that the vessel was bound for the United States. However, the Coast Guard made no effort to determine the intended destination of each passenger on a particular vessel. If the Coast Guard believed that the vessel was headed for the United States, the Coast Guard interdicted all passengers, even if the passengers were willing to go to locations other than the United States. Because of their lack of seaworthiness, most of the interdicted Haitian vessels, if not all, would not have made it to the United States. In fact, some of the Haitian vessels landed in Cuba, Jamaica and the Bahamas. When the Coast Guard detained a Haitian vessel, it boarded the vessel and required all passengers to disembark. After all of the passengers had complied, the Coast Guard destroyed the Haitian vessel. Interdicted Haitians were thus given no option but to be detained on the Coast Guard cutter and to be taken to whatever location the Coast Guard elected.

Asylum Screening and Pre-Screening Procedures

Following the coup, the United States temporarily suspended its repatriation program while the Immigration and Naturalization Service ("INS") consulted with the United States Department of State ("State Department") on the procedures for handling the Haitian refugees. While the INS awaited a decision from Washington, the Coast Guard cutters with Haitian refugees aboard circled in international waters. For health and safety reasons, the cutters docked at Guantanamo Bay Naval Base, Cuba ("Guantanamo") on or about November 13, 1991 and the Haitians disembarked. A few days later, the decision making authority for determining whether interdicted Haitians were screened in or screened out was delegated back to INS officers in the field.

On November 22, 1991, the Office of the Deputy Commissioner of INS issued a memorandum stating that a "credible fear of return" standard was to be utilized in asylum pre-screening procedures. Under this "credible fear" standard, Haitians with only one or two "refugee-like" characteristics would be "screened in," and thus determined to be eligible for political asylum. Interdicted Haitians with no " refugee-like" characteristics would be "screened out," and thus determined to be ineligible for political asylum and subject to repatriation. The "credible fear of return" standard was designed to be far more generous than the "well-founded fear of return" standard generally applied to asylum seekers.

As the number of interdicted Haitians rose, the INS transferred their interviewing operations from the Coast Guard cutters to Guantanamo. The interviews were conducted by highly trained members of the INS asylum corps which included INS officers, immigration lawyers, and human rights monitors. No attorneys representing the refugees were present during the "credible fear of return" interviews. Since October 1991, the INS screened in 10,500

Haitians found to have a "credible fear of return" and transported them to the United States to apply for asylum. An additional 25,000 interdictees were returned to Haiti by the Coast Guard after undergoing INS prescreening. A very small number were accepted by third countries.

Rescreening HIV+ Haitian Detainees

Soon after the INS began its Guantanamo operation, the United States began to seek third countries in which the Haitians could be relocated. The State Department pursued this with various countries in the region. Two countries, Belize and Honduras, offered to provide limited assistance, but prior to accepting the Haitians, asked that they be tested for the HIV virus. The results of those tests disclosed the presence of the virus in a number of the Haitian detainees at Guantanamo leading the Government to conduct HIV testing for all screened-in Haitians. The Haitians are the only group of asylum seekers to be medically tested for HIV.

Prior to September 1991 all screened-in Haitian refugees were brought to the United States before receiving medical screening. As Gene McNary, then INS Commissioner, in a memorandum dated May 30, 1991, entitled "'Asylum Pre-Screening of Interdicted Aliens and Asylum Seekers in INS Custody" wrote: "[i]nterdicted asylum seekers identified at sea for transfer to the United States will be properly inspected and medically screened *upon arrival* into the United States."

Then in a memorandum dated February 29, 1992, Grover Joseph Rees, INS General Counsel, stated a new INS policy requiring second or "well-founded fear" interviews of screened in persons who tested positive for the Human Immunodeficiency Virus ("HIV"). He wrote, in pertinent part:

> [A]ny person "screened in" as a possible refugee who has been determined to have a communicable disease that is not curable should be given an interview to determine whether he or she is a refugee within the definition of INA § 101(h)(42). In the case of a Haitian national in Guantanamo, this definition requires a finding that the person is unable or unwilling to return to Haiti because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This finding is identical to that required to grant asylum or refugee status. *The interview should therefore be identical in form and substance, or as nearly so as possible, to those conducted by asylum officers to determine whether asylum should be granted to an applicant already in the United States.*

By letter dated March 11, 1992, attorneys for the Haitian Service Organizations requested permission to communicate with the screened-in Haitians held on Guantanamo. The request was denied. The Screened In Plaintiffs detained on Guantanamo themselves repeatedly requested counsel. Their requests were also denied. The military, did not oppose visits from counsel and when such visits have been permitted, the military has not found any disruption to the operation of the camp. Other groups, including the press, clergy, and non-U.S. contract workers (*e.g.*, Cubans, Jamaicans and Filipinos) have been permitted access to Guantanamo. In the absence of attorneys, the Haitians have received legal advice from the military, INS, Community Relations Service representatives, ministers and even military doctors.

Notwithstanding the fact that attorneys are regularly present during nearly identical asylum interviews in the United States, the INS refused to permit the Screened In Plaintiffs to have counsel

present at their "well-founded fear" interview. At trial, an INS official expressed the agency's concern with the presence of attorneys at asylum interviews saying that lawyers would only stress the positive element of an applicant's case and deemphasize the negative aspects. This Court finds that lawyers serve a necessary and useful purpose in representing an asylum seeker in connection with the well-founded fear of return interview. Their presence at these interviews is also clearly feasible. The Government's decision to deny Plaintiff Haitian Service Organizations access to Camp Bulkeley is based solely on the content of what they had to say and the viewpoint they would express.

The second interviews, like the first interviews, were conducted in the absence of attorneys. Of the HIV+ Screened In Plaintiffs who underwent the second interview, 115 Haitians were found to have a well-founded fear of return. A number of HIV+ Haitians who had been screened in were repatriated to Haiti after having failed the second interview or having declined to undergo the second interview. Haitians who received an adverse determination did not have the opportunity to appeal the decision.

Guantanamo Operation

The United States Naval Base at Guantanamo Bay, Cuba, is subject to a lease agreement between the United States and Cuba which states that:

> during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

The U.S. Naval Base at Guantanamo is a "relatively open base'" to which non-military personnel such as military dependents, foreign nationals, contractor employees providing support services, and

civilian government employees are allowed access. The facilities include schools, bars, restaurants, a McDonalds and a Baskin-Robbins.

When the first group of Haitians arrived in November 1991, the existing facilities at Guantanamo were not sufficient to provide housing for all interdictees. A special Joint Task Force ("JTF") comprised of several branches of the Armed Services, was sent to Guantanamo to provide temporary humanitarian assistance to the Haitians including housing, food, and medical care from military physicians. In order to house the Haitians, the JTF evicted U.S. military personnel from the cinder block quarters at Camp Bulkeley on the eastern edge of the base. Tents were also erected at Camp Bulkeley to temporarily house the several thousand migrants who arrived at Guantanamo at the outset. When Camp Bulkeley's capacity proved inadequate, the JTF opened a new series of camps at the unused McCalla air field. These McCalla camps were all tent facilities except for the large hangar at the airfield.

Portable toilets were made available for use by the Haitians. Flush toilets were not provided because there were insufficient facilities at Guantanamo to treat the sewage. The portable toilets are pumped out by the military on a regular schedule, usually three times a week; military personnel also regularly disinfect the portable toilets though the Haitians themselves are responsible for keeping the inside of the toilet facilities clean. Later, latrines were built at Camp Bulkeley in order to alleviate sanitation problems caused by the portable toilets. The new latrines allowed the military to hose down the area and prevented the collection of trash and other waste.

At several times during the months between November 1991 and May 1992, the base reached its 12,500 migrant capacity.[5] This limit existed because of the base's infrastructure and its ability to provide adequate water, sanitation, and the other essentials to the combined populations of interdicted Haitians, military personnel, and civilian workers and dependents.

The camps at Guantanamo were organized around the INS interview process. Upon arrival, interdictees would receive identification cards and bracelets. They would then be screened by the INS. Haitians who were "screened out" would be placed in a camp for those being repatriated to Haiti. Haitians who were "screened in" would be moved to another camp to await processing for transport to the United States.

In March 1992, after the prevalence of the HIV virus among the refugee population was ascertained, the JTF created a separate camp for them. Camp Bulkeley was chosen for that purpose. The then existing population of HIV negative Haitians at Camp Bulkeley remained until they were processed and departed Guantanamo. As "screened in'" HIV+ Haitians were identified, they were transferred to Camp Bulkeley, eventually making it predominantly an HIV+ facility. The camp also contained HIV negative relatives of the HIV+ Haitians.

Today there are approximately 200 "screened in"' HIV + Haitians remaining at Guantanamo. They live in camps surrounded by razor barbed wire. They tie plastic garbage bags to the sides of the building to keep the rain out. They sleep on cots and hang sheets to create some semblance of privacy. They are guarded by the military and are not permitted to leave the camp, except under

---

5. Approximately 36,000 Haitian interdictees passed through the various camps at Guantanamo between November 1991 and July 1992.

military escort. The Haitian detainees have been subjected to pre-dawn military sweeps as they sleep by as many as 400 soldiers dressed in full riot gear. They are confined like prisoners and are subject to detention in the brig without a hearing for camp rule infractions. Although the Haitian detainees have a chapel, weight room, bicycle repair shop, beauty parlor and other amenities at their disposal, none of these things are currently available to them, as they are now confined to Camp Alpha, a small section of Camp Bulkeley, or to the brig.

Medical Care at Guantanamo

Medical care is provided through a Battalion Aid Station ("BAS", or clinic) at Camp Bulkeley and the Guantanamo Naval Hospital. The clinic is staffed by two physicians, a United States Navy doctor, Board certified in family practice, and a doctor who is a specialist in infectious disease. The infectious disease specialist is responsible for overseeing the drawing of blood for T-cell counts[6] of the migrants and counselling them regarding their T-cell counts, prescribing anti-retroviral drugs for HIV, and supervising the treatment of any other case of contagious illness, including tuberculosis or sexually transmitted diseases. The infectious disease specialist also supervised educational, counselling, and clinical care programs, and was responsible for seeing patients daily regarding specific aspects of their HIV care.

The two physicians are assisted by a medical staff of four registered nurses, three independent duty corpsman, a family practice nurse practitioner, 20 general duty corpsmen, and a preventive medicine technician whose duties include spraying

---

6. According to Centers for Disease Control surveillance case definition, an HIV infected individual with T cell counts of 200 or below or percentages of 13 or below has full-blown AIDS.

standing water against insects, and rodent control. The clinic is a cinderblock, air conditioned building with four examining rooms, a large waiting area, a laboratory, and a pharmacy. The clinic, open generally from 7:30 a.m. to 4:00 p.m. daily, has 11 beds, but its capacity is expandable to about 55.

The Haitians do not need an appointment to come to the clinic, however, they may make appointments to see physicians as needed. The clinic is staffed 24 hours a day, seven days a week either by general duty corpsmen or physicians. If the general corpsman needs further assistance, he or she contacts the independent duty corpsman. If the independent duty corpsman needs assistance, he or she contacts the physician on call. Physicians on call to the clinic at Camp Bulkeley wear beepers and can be, and often are, summoned at any time.

Medical specialists from the Naval Hospital, including an OB/GYN, psychiatrist, orthopedic surgeon, general surgeon, doctor of internal medicine, pediatrician, and three family practitioners are available to treat the Haitians. The physicians at Camp Bulkeley can, and do, admit patients to the hospital. The physicians at Camp Bulkeley have cared for all populations in the Haitian community at Guantanamo. Children have been fully immunized in compliance with United States standards. In addition, tuberculosis among the migrants has been vigorously treated with supervised drug therapy. Pregnant women among the migrants at Guantanamo have received care commensurate with what they would receive in the United States including ultrasound.

Despite the ability of military doctors and facilities to treat routine illnesses, the Government acknowledges that the medical facilities on the Guantanamo Naval Base are inadequate to provide medical care to those Haitians who have developed AIDS, particularly patients with T-cell counts of 200 or below or a

percentage of 13 or less. The military doctors believe that the medical facilities on Guantanamo are inadequate to treat such AIDS patients, because there is neither a CT scanner nor a variety of specialists (such as ophthalmologists, neurologists, pulmonologists, nephrologists and oncologists) that are necessary to diagnose and treat those with AIDS. The military doctors first raised these concerns at least as early as May, 1992. The military has requested that certain HIV+ Haitians be medically evacuated from Guantanamo because the military does not believe it can provide adequate medical care to those patients on Guantanamo. Certain of these requests have been denied by the INS on more than one occasion.

At trial the Government did not offer any evidence which would prove the facilities at Guantanamo to be adequate. In fact, defendants' counsel admitted that "the medical facilities at Guantanamo are not presently sufficient to provide treatment for such AIDS patients under the medical care standard applicable within the United States itself." But when asked whether the Government was "prepared to send those [patients] to the United States for treatment," Defendants' counsel responded, "The government does not intend at this point to do that."

The INS offered no explanation for its repeated refusal to accept the recommendation of the military doctors and Camp Commanders in whom the INS has entrusted the care of the Screened In Plaintiffs. The Court was disturbed to hear the testimony of Duane "Duke" Austin, the INS Special Assistant to the Director of Congressional and Public Affairs, who reportedly remarked to the press with regard to the Haitians with AIDS held on Guantanamo, "they're going to die anyway, aren't they?" It is outrageous, callous and reprehensible that defendant INS finds no

value in providing adequate medical care even when a patient's illness is fatal.

Although the defendants euphemistically refer to its Guantanamo operation as a "humanitarian camp," the facts disclose that it is nothing more than an HIV prison camp presenting potential public health risks to the Haitians held there. There is no dispute that because HIV+ individuals are immuno-suppressed, they are more susceptible to a variety of infections, many of which can be transmitted from one person to the next. No major outbreak of infectious disease has occurred yet, but by segregating HIV+ individuals, the Government places the Haitian detainees at greater risk of contracting infections, including tuberculosis, measles and other life threatening diseases, than if they were permitted to live in the general population. Indeed, Dr. James Mason, then Assistant Secretary for Health, Department of Health and Human Services ("HHS"), wrote to Gene McNary, then INS Commissioner, on March 25, 1992, that HHS had "growing public health concerns" in connection with the operation of an HIV+ prison camp. As the Centers for Disease Control wrote: "the presence of a large number of HIV-infected individuals held for a long period of time in a camp environment is likely to result in significantly increased public health risks to the migrants and others in the camp." The military itself recognized in March 1992 that "[f]rom a medical standpoint we could have a serious medical problem if any type of infectious disease hits the camp. The major issue being that we could not provide them the adequate level of care required in this situation."

In addition, the prison camp environment created by the Government is not conducive to an effective doctor-patient relationship. Nevertheless, plaintiffs do not dispute that the military doctors have worked hard to serve the Haitians held there, but for

a variety of reasons, the doctor-patient relationship has been frustrated. Despite the commendable efforts by the military doctors to serve the Haitian detainees, many of the Haitians held on Guantanamo do not trust the military doctors. Some Haitians believed that the military doctors were involved in their continued detention on Guantanamo. Cultural differences between the Haitians and the military doctors have also impaired communications.

The seriously impaired doctor-patient relationship makes it more difficult for defendants to provide adequate medical care at the camp. Even if Defendants continue to provide medical services, many of the Haitian detainees will grow increasingly sick because they do not trust their diagnosis or the medication prescribed for them.

CONCLUSIONS OF LAW

I. Class Certification

A class action may be brought under Rule 23(a) if the class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to all, the claims or defenses of the representative parties are typical of the claims or defenses of the class and the representative parties will fairly and adequately protect the interests of the class. In addition to the above prerequisites, an action may be maintained as a class action if the opposing party "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding injunctive relief with respect to the class as a whole." Rule 23(b)(2).

The Complaint defines the Haitian class as "[a]ll Haitian citizens who have been or will be "screened-in" -- including those who have been or may be subject to or who have resisted additional

screening procedures -- who are now, will be or have been detained on Guantanamo Naval Base, or any other territory subject to United States jurisdiction or Coast Guard cutters." The Court finds that this class warrants class action treatment under Rule 23(a) and 23(b)(2) because: they are sufficiently numerous; the Government has acted or threatened to act on grounds generally applicable to each member of each class, thus making final declaratory and injunctive relief with respect to each class as a whole appropriate; the plaintiffs are adequate representatives of their classes; and the claims of the named plaintiffs are both common to and typical of the claims of members of the class. Regarding the immediate relative class defined in paragraph 44, the Plaintiffs have presented no evidence whatsoever at trial relating to the claims of the "immediate relative plaintiffs." The Court therefore refuses to certify this class and hereby dismisses their claims.

II. Collateral Estoppel

Throughout this action, the Government has maintained that this action is procedurally barred by the outcome of the prior litigation in *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992). The Second Circuit has twice held in this very case that *Haitian Refugee Center, Inc.* involved (1) different parties, the screened-out Haitians; (2) different claims, challenges to aspects of the old interdiction program that harmed only those screened-out; and (3) circumstances substantially different from those presented here. *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1331 (2d Cir. 1992) (hereinafter "HCC I"); *Haitian Centers Council v. McNary*, 969 F.2d 1350, 1354 (2d Cir. 1992) *cert. granted*, 113 S. Ct. 3 (1992) (No. 92-344) (hereinafter "HCC II"). Therefore, neither collateral estoppel nor res judicata bars the class of screened-in Haitians in

U.S. custody at Guantanamo Naval Base, Cuba, from challenging the Government's conduct.

III. Haitian Service Organizations' First Amendment Rights

Plaintiff Haitian Service Organizations' First Claim for Relief is that the Government has violated their First Amendment right by denying them and their attorneys access to the Screened In Plaintiffs for the purpose of counselling, advocacy and representation.

The right of legal and political advocacy organizations to associate with and advise persons regarding their legal rights are modes of political expression protected by the First Amendment. *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963). While the government may restrict speech and association in a nonpublic forum, its actions must constitute a reasonable means of achieving a legitimate government interest. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-54 (1983). Such regulation of speech may not discriminate based on the viewpoint of the speaker. *See Perry Education Ass'n*, 460 U.S. at 37, 46. However, the Government fails to establish a legitimate interest when it opens a nonpublic forum to some, but excludes others who seek to speak, based on the content of their speech. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1031 (2d Cir. 1985) (prison commissioner's decision to exclude a report on prison conditions to prison inmates exceeded his discretion because his "decision to ban the... [r]eport *was based solely on distaste for its message*") (emphasis added).

The First Amendment says that "Congress shall make no Law... abridging the freedom of speech. " U.S. Const. amend. I. That provision applies on Guantanamo Bay Naval Base, which is

under the complete control and jurisdiction of the United States government, and where the government exercises complete control over all means of delivering communications. *See generally Flower v. United States*, 407 U.S. 197, 198-99 (1972) (First Amendment applicable to U.S. conduct on a military base); *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (Establishment Clause of the First Amendment applies extraterritorially). The Government has violated the Haitian Service Organization's First Amendment rights to free speech and to associate for the purpose of providing legal counsel by denying them equal access to the screened-in Haitians held on Guantanamo. Defendants have permitted press, clergy, politicians and other non-lawyers to meet with the Haitians and have permitted many others, including non-citizen contract workers, onto the base. In addition, the Haitians have received legal advice, which has often been erroneous, from the military, the INS, the Community Relations Service and even military doctors. The legal rights and options of Haitian detainees are discussed on Guantanamo, but only from the viewpoint of which the Government approves.

The Government has frequently cited *Ukrainian-American Bar Ass'n v. Baker*, 893 F.2d 1374 (2d Cir. 1990), in support of its argument that the Haitian Service Organizations have no First Amendment right of access to an alien in the custody of the United States. The Court believes that case can be distinguished. In *Ukrainian-American Bar Ass'n v. Baker*, the plaintiff attorneys sought access, at government expense, to a forum to which no other non-governmental person had been given access, *id.* at 1381-82, and where the restrictions at issue were neither content- nor view-point-based. *Id.* at 1381. Moreover, in *Ukrainian-American*, plaintiffs sought access to a *potential* alien client who had neither retained the plaintiff as counsel nor asserted a right to speak with counsel. *Id.*

Here, the Haitian Service Organizations have been retained by the Screened In Plaintiffs and have asserted a right to speak with their clients, the screened-in Haitians. The lawyers here seek only to communicate, at their own expense, with clients who have specifically sought them out. Countless persons other than the Haitians' lawyers have been permitted to visit, to consult with, and to give advice to the Haitians detained at Guantanamo. The Court thus finds that the lawyers for the Haitian Service Organizations have been barred because of the viewpoint of the message they seek to convey to the Haitians, in violation of the First Amendment. Such Government discrimination against disfavored viewpoints strikes at the heart of the First Amendment. *See, e.g., Travis v. Owega - Appalachian School Dist.*, 927 F.2d 688, 693-94 (2d Cir. 1991). The right of the Haitian Service Organizations to impart information or otherwise exercise their own First Amendment rights does not depend on whether the screened-in Haitians have an independent right to counsel. *See Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (First Amendment rights of correspondents to uncensored communication with prisoners does not depend on the status of prisoners' claim). That aliens are inside a detention camp does not "bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside,'" *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (citation omitted). Therefore, the Court does not reach the question of whether the Haitian detainees at Guantanamo have a First Amendment right.

IV. Due Process

Plaintiffs' Third Claim for Relief in the Amended Complaint states that the Government has violated the Screened In Plaintiffs' due process rights under the Fifth Amendment. The Due Process Clause is phrased in universal terms, protecting any "person," rather than members of "the people." U.S. Const. Amend. V. The U.S.

Naval Base at Guantanamo Bay, Cuba, is subject to the exclusive jurisdiction and control of the United States where the criminal and civil laws of the United States apply. *HCC I*, 969 F.2d at 1342 (citing *United States v. Lee*, 906 F.2d 117, 117 & n.1 (4th Cir. 1990). The courts have protected the fundamental constitutional rights of noncitizens in other territories subject to exclusive U.S. jurisdiction and control, including the former American Sector of Berlin, the Canal Zone, and the Pacific Trust Territories. *United States v. Tiede*, 86 F.R.D. 227, 249-53 (U.S. Ct. Berlin 1979) *Government of Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974), *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977), *Nitol v. United States*, 7 Cl. Ct. 405 (1985).

The Supreme Court has long held that aliens outside the United States are entitled to due process in civil suits in United States courts. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987). Constitutional and other fundamental rights apply to citizens and noncitizens outside the United States who encounter official U.S. action. *Asahi Metal Indus. Co.*, 480 U.S. 102; *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Streifel*, 665 F.2d 414 (2d Cir. 1981); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

As the Second Circuit decided, there is "no principled basis for concluding that the 'screened in' plaintiffs detained at the base would have fewer substantive rights" than aliens "arrested and accused . . . at Guantanamo." *HCC I*, 969 F.2d at 1343. Moreover, it would not be "incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States." *HCC I*, 969 F.2d at 1343. Nor would it be either "impracticable" or "anomalous" to

apply the Due Process Clause to screened-in Haitians held in U.S. custody on Guantanamo. These

> "interdicted Haitians are not 'some undefined, limitless class of noncitizens who are beyond our territory,' they are instead an identifiable group of people who were interdicted by Americans in international waters pursuant to a binding Agreement Between the United States of America and Haiti, and who have been detained on territory that is subject to the exclusive control of the United States.... [I]n this case the United States has exercised its 'undoubted power ... to take actions to assert its legitimate power and authority abroad,'... in both interdicting and bringing these Haitians to territory controlled by the United States."

HCC I, 969 F.2d at 1343 (citations omitted). These Haitians are at a military base solely because defendants chose to take them there. The United States government has already bound itself by treaty not to "impose penalties" on persons it has recognized as refugees, who flee to the United States "directly from a territory where their life or freedom was threatened" on account of political persecution. U.N. Refugee Convention, art. 31.1. If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin.

When this Court issued the first preliminary injunction in this case, it found that the Haitian detainees had a due process right to counsel under the Fifth Amendment. The Government has continued to detain the Screened In Plaintiffs. In fact, the Haitian detainees have been confined for nearly two years. As the Haitians'

ties to the United States have grown, so have their due process rights. *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950). The Haitian detainees are imprisoned in squalid, prison-like camps surrounded by razor barbed wire. They are not free to wander about the base. Guarded by the military day and night, the Screened In Plaintiffs are subject to surprise pre-dawn military sweeps conducted by soldiers outfitted in full riot gear searching for missing detainees. Haitian detainees have been punished for rule infractions by being flexicuffed and sent to "administrative segregation camp" (Camp Alpha or Camp 7) or the brig. Such conditions cannot be tolerated when, as here, the detainees have a right to due process.

A. Access to Counsel During "Well-Founded" Interviews

The Screened In Plaintiffs have a protected liberty interest in not being wrongly repatriated to Haiti, *Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983), and to due process before defendants alter their screened in status. *HCC I*, 969 F.2d at 1345. The Haitian detainees also have a protected liberty interest in their "reasonable expectation" of avoiding erroneous return based on the affirmative actions of the Executive and Congress. *HCC I*, 969 F.2d at 1345 (citing *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610, 614 (2d Cir. 1958)).

A protected liberty or property interest cannot be denied without constitutionally adequate due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984). To determine what process is due, the Court must balance three factors: "(a) the private interest involved, (b) the risk of an erroneous deprivation of that interest through the procedures utilized, as well as the probable value of additional procedural safeguards, and (c) the government's interest,

including the burden that additional procedural requirements would impose." *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 902 (2d Cir. 1992). *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Baden v. Koch*, 799 F.2d 825, 831 (2d Cir. 1986).

First, the private interest of the Screened In Plaintiffs not to be returned to Haiti is of the highest order. Based on the INS's own findings, the screened- in Haitians have already been found to have at least a credible fear of return. This showing exceeds that of an unscreened asylum applicant in the United States whose interest in applying for asylum is constitutionally protected. *See Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 377 (C.D. Cal. 1982), *aff'd Thornburgh v. Orantes-Hernandez*, 919 F.2d 549 (9th Cir. 1990) (asylum applicant—who has not yet made any showing of persecution—has liberty interest in not being erroneously denied asylum). *See Azzouka v. Sava*, 777 F.2d 68, 74 (2d Cir. 1985) (right to apply for political asylum is a constitutionally protected interest, which triggers the safeguards of the due process clause); *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (same); *Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983) (right to resist return to persecution).

Second, the risk of erroneous deprivation and the benefits of additional procedural safeguards are equally great. Absent a proper and fair adjudication, the screened-in Haitians' legitimate claims are likely to be denied either at the initial screening or in the final adjudication. The evidence establishes, and defendants concede, that representation by counsel and recourse to the processes available to asylum applicants in the United States, such as access to counsel before, during and after the interview, an opportunity to respond to a Notice of Intent to Deny, and administrative and judicial review, provide a significant benefit to asylum applicants undergoing the

well-founded fear determination in general and to screened-in Haitians at Guantanamo in particular. "Permitting access to attorneys is a reasonable method to insure that the 'screened-in'" plaintiffs are not wrongly repatriated to a country in which they have already been found by our government to have a credible fear of being persecuted." *HCC I*, 969 F.2d at 1346.

Finally, the only burden the government has alleged in connection with affording the Haitians procedural due process is associated with possible delays in adjudicating claims and the impact of deploying INS personnel to Guantanamo. Yet the evidence shows that much of any delay is attributable to actions by the government, not the applicant. Furthermore, all of the purported governmental burden would be eliminated if the remaining Haitian detainees were brought to the United States to be integrated into the domestic asylum process. The Court concludes that a balancing of the three *Mathews* factors requires that the process due screened-in Haitians at Guantanamo who are subjected to well-founded fear interviews is the process that is available to asylum applicants in the United States. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

B. Medical Care

Constitutional due process mandates both provision of adequate medical care to persons in official custody, *Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983), and "safe conditions". *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982). *See generally DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200 (1989). As persons in coercive, nonpunitive, and indefinite detention, the Haitian detainees on Guantanamo are constitutionally entitled to medically adequate conditions of confinement.

Courts have consistently held, in a variety of contexts, that the due process rights of persons in nonpunitive detention are greater

than the Eighth Amendment protections afforded to convicted prisoners. *Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979) (pretrial detention); *Youngberg*, 457 U.S. at 321-22 (1982) (involuntary commitment); *Rhyne v. Henderson County*, 973 F.2d 386, 391 (5th Cir. 1992) (pretrial detainees); *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988) (pretrial detainee). Persons in nonpunitive detention have a right to "reasonable medical care", a standard demonstrably higher than the Eighth Amendment standard that protects convicted prisoners: "deliberate indifference to serious medical needs." *Compare Estelle v. Gamble*, 429 U.S. 97, 104 (1976) *with Rhyne v. Henderson County*, 973 F.2d at 391; *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987).

At a minimum, due process forbids governmental conduct that is deliberately indifferent to the medical needs of non-convicted detainees. *Hill v. Nicodemus*, 979 F.2d 987, 991-92 (4th Cir. 1992) (including psychological condition); *Gordon v. Kidd*, 971 F.2d 1087, 1094 (4th Cir. 1992); *Bowen v. Manchester*, 966 F.2d 13, 16-17 (1st Cir. 1992); *Hall v. Ryan*, 957 F.2d 402, 406 & n.6 (7th Cir. 1992) (including risk of suicide); *Barber v. City of Salem*, 953 F.2d 232, 238 (6th Cir. 1992); *Elliot v. Cheshire County*, 940 F.2d 7, 10 (1st Cir. 1991); *Liscio v. Warren*, 901 F.2d 274, 276-77 (2d Cir. 1990). Deliberate indifference to medical needs includes government officials' denial or delay of detainees' access to medical care, interfering with treatment once prescribed, or their lack of response to detainees' medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986); *Todaro v. Ward*, 565 F.2d 48, 52-53 (2d Cir. 1977). Deliberate indifference to medical needs also includes government officials rejection of recommendations or requests for medical treatment by their own medical doctors that exposes the person detained to undue suffering or serious medical risk. *See Scharfenberger v. Wingo*, 542 F.2d 328, 331, 332 (6th Cir. 1976);

Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976); *Elliot*, 940 F.2d at 10; *Youngberg*, 457 U.S. at 323.

The military's own doctors have made INS aware that Haitian detainees with T-cell counts of 200 or below or percentages of 13 or below should be medically evacuated to the United States because of a lack of facilities and specialists at Guantanamo. Despite this knowledge, Defendant INS has repeatedly failed to act on recommendations and deliberately ignored the medical advice of U.S. military doctors that all persons with T-cell counts below 200 or percentages below 13 be transported to the United States for treatment. Such actions constitute deliberate indifference to the Haitians' medical needs in violation of their due process rights.

C. Disciplinary Proceedings

Plaintiffs also assert that the military's disciplinary procedures violate their due process rights. Detained aliens, like prisoners, are entitled to due process protection against arbitrary discipline. *Orantes-Hernandez v. Smith*, 541 F. Supp. at 385. When a "major change in the conditions of confinement" is imposed as punishment for a specific infraction, *Wolff v. McDonnell*, 418 U.S. at 571 n. 19, the Due Process Clause requires a constitutionally adequate process. *Bell v. Wolfish*, 441 U.S. at 535, 537-38; *Woodson v. Lack*, 865 F.2d 107 (6th Cir. 1989). For example, the Second Circuit has held that confinement of fourteen days or more in a "special housing unit", *McCann v. Coughlin*, 698 F.2d 112, 119, 121-22 (2d Cir. 1983), or in one's own quarters *McKinnon v. Patterson*, 568 F.2d 930, 936-37 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), is a "sufficiently serious deprivation" of a liberty interest to implicate the Due Process Clause. *McCann*, 698 F.2d at 120-22. At Guantanamo, the JTF places Haitian detainees exhibiting behavioral problems in "administrative segregation." When a detainee is "segregated," he is removed from the general population and placed

in Camp 7, Camp Alpha or the brig for a few days or a few weeks. The Court finds this "administrative segregation" to be tantamount to punishment constituting a deprivation of liberty and raising procedural due process issues.

Courts have held that before the imposition of such punishment, due process requires written notice of the allegations, a hearing, a written decision, an opportunity to call witnesses and present evidence, access to counsel, and an impartial decisionmaker. *Wolff*, 418 U.S. 539, 563-70; *McCann*, 698 F.2d at 122. JTF commanders have employed various "informal" procedures for addressing behavioral problems among the detainees and between the JTF and the detainees. These procedures have included informing the detainee of the allegations made against him, providing an opportunity to respond, speaking with the president of the camp and a final determination by a senior military officer. However, none of these procedures have included written notice, a hearing, an opportunity to call witnesses, access to counsel, or guarantee of an impartial decisionmaker. Therefore, the Court finds that the JTF's informal "administrative segregation" procedures to be violative of the detainees' procedural due process rights.

D. Indefinite Detention

As individuals held in custody by the United States, the Screened In Plaintiffs also have a liberty interest in not being arbitrarily or indefinitely detained. *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (involuntarily committed mental patient); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 (1972) (convict who completed sentence but continued to be held in mental hospital); *Doherty v. Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991) (alien detained pending deportation); *United States v. Gonzales Claudio*, 806 F.2d 334, 339 (2d Cir. 1986) (pre-trial detainee). Courts have upheld continued detention where (1) there are valid

reasons for it, *i.e.*, where the alien possesses a criminal record or constitutes a national security risk, *see e.g. Shaughnessy v. United States*, 345 U.S. 206 (1953); *Alvarez v. Stock*, 941 F.2d 956 (9th Cir. 1991), (2) the alien bears some responsibility for delaying the process, and (3) the detention will eventually end. *Doherty*, 943 F.2d at 211-12.

Here, the Screened In Plaintiffs' continued detention is the result of the Defendants' actions, not the aliens' own choices. The Government stopped processing the cases of these and other screened-in Haitians in June 1992, after the Second Circuit upheld this Court's injunction entitling the Haitians to be represented by counsel. One-hundred and fifteen Haitians at Guantanamo have met the well-founded fear standard in the second interviews and have remained in detention for almost two years.

Even now, the INS has not stated when these individuals' claims will finally be adjudicated and when any subsequent parole determinations will be made. Nor has the INS stated what it will do with those Haitians who are ultimately denied parole into the United States, but who have demonstrated a well-founded fear of persecution if returned to Haiti. Testimony revealed that the Haitians were told that they could be at Guantanamo for 10-20 years or possibly until a cure for AIDS is found. Continued detention constitutes a denial of due process where there is no guarantee that "detention will end when [plaintiffs have] exhausted [their] remedies under our laws." Bertrand, 684 F.2d at 207 n.6. *see also United States v. Gonzales-Claudio*, 806 F.2d 334, 341 (2d Cir. 1986).

Finally, the detained Haitians are neither criminals nor national security risks. Some are pregnant mothers and others are children. Simply put, they are merely the unfortunate victims of a fatal disease. The Government has failed to demonstrate to this Court's

satisfaction that the detainees' illness warrants the kind of indefinite detention usually reserved for spies and murderers. *Cf. Shaughnessy v. United States*, 345 U.S. 206 (1953); *Alvarez-Mendez v. Stock*, 941 F.2d 956 (9th Cir. 1991). Where detention no longer serves a legitimate purpose, the detainees must be released. The Haitian camp at Guantanamo is the only known refugee camp in the world composed entirely of HIV+ refugees. The Haitians' plight is a tragedy of immense proportion and their continued detainment is totally unacceptable to this Court. *See Rubinstein v. Brownwell*, 206 F.2d 449, 456 (D.C. Cir. 1953) *aff'd*, 346 U.S. 9292 (1954); *Lie v. Greene*, 767 F. Supp. 1087, 1091 (D. Colo. 1991) (detainees must be released where detention no longer serves a legitimate purpose).

IV. Violations of Administrative Procedure Act

For their Fifth Claim for Relief, Plaintiffs allege that (a) the Government violated the APA by conducting unauthorized "well-founded fear" interviews and (b) the Attorney General abused her discretion by denying parole for the screened-in Haitian Plaintiffs. The Administrative Procedure Act, 5 U.S.C. §§ 701, 706(2) (1982), authorizes this Court, at the request of aggrieved persons, to "hold unlawful and set aside agency action [that is] ... (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (C) in excess of statutory jurisdiction, authority, or limitations...." Defendants' decisions in relation to the processing and detention of Haitians at Guantanamo constitute final "agency action," because "the agency has completed its decision making process, and . . . the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992). As persons "adversely affected or aggrieved by agency action," 5 U.S.C. § 702, the Screened In Plaintiffs have a cause of action under the APA for injunctive relief against defendant officials. Nonresident aliens located outside the United

States qualify as "aggrieved persons" with standing to obtain review in U.S. courts of the legality of U.S. governmental actions that adversely affect them. *See, e.g., Juarez v. I.N.S*, 732 F.2d 58 (6th Cir. 1984); *Silva v. Bell* 605 F.2d 978, 984-85 (7th Cir. 1979); *Mendez v. I.N.S*, 563 F.2d 956 (9th Cir. 1977); *Constructores Civiles de Centroamerica S.A. (Concica) v. Hannah*, 459 F.2d 1183, 1191-92 (D.C. Cir. 1972).

A. Conduct In Excess of Statutory Authority

The APA authorizes reviewing courts "to hold unlawful and set aside agency action...in excess of statutory...authority...." 5 U.S.C. § 706(2). "It is 'central to the real meaning of "the rule of law," [and] not particularly controversial' that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so." *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) (citations omitted); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Agency actions that do not fall within the scope of a statutory delegation of authority are *ultra vires* and must be invalidated by reviewing courts. *Id. See also SEC v. Sloan*, 436 U.S. 103, 118-19 (1978); *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 334 (1961); 5 U.S.C. §§ 701, 706(2)(C) (1988) (authorizing judicial review of agency actions "in excess of statutory jurisdiction, authority, or limitations").

In the immigration field, the authority of the executive "is limited to the zone charted by Congress. If such [executive] officers depart from the channels of authority fixed by statute they act illegally." C. Gordon & S. Mailman, 1 Immigration Law & Practice § 9.02, at 9-519, *citing Mahler v. Eby*, 264 U.S. 32 (1924); *Gegiow v. Uhl*, 239 U.S. 3, 9-10 (1915) (defendant's effort to exclude an alien on a different basis from that authorized by Congress was beyond the scope of defendant's authority and therefore invalid).

See also Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U.S. 329, 335 (1932) (courts may review executive action in immigration field to ensure compliance with grant of statutory authority).

Courts will invalidate executive action that is unsupported by express statutory authority. *See, e.g., Jean v. Nelson*, 472 U.S. 846 (1985), *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389-90 (10th Cir. 1981) (plaintiff ordered released because INS lacked statutory authority to detain Mariel Cubans indefinitely). *Bertrand v. Sava*, 684 F.2d 204, 210, 212 & n.12 (2d Cir. 1982); *American Baptist Churches v. Meese*, 712 F. Supp. 756, 774 (N.D. Cal. 1989). Only two provisions of the INA authorize the INS to adjudicate claims of persons seeking refuge from political persecution: Section 207, which governs overseas refugee processing, and Section 208, which governs asylum for aliens at a land border or physically present in the U.S.

In the Refugee Act of 1980 Congress had two goals. First, it established Sections 207 and 208 as the exclusive mechanisms for determining whether persons meet the refugee definition. *INS v. Stevic*, 467 U.S. 407, 425-27 (1984); *Amanullah v. Nelson*, 811 F.2d 1, 12 (1st Cir. 1987). Second, Congress explicitly restricted the Attorney General's use of the "parole authority" to circumvent the carefully structured system established by § 207 and § 208. *Amanullah*, 811 F.2d at 12.

> Amid growing dissatisfaction with the existing law, Congress in 1980 comprehensively revised the standards and procedures governing asylum. *See* The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. This legislation replaced the attorney general's *ad hoc parole authority* with a systematic procedure for adjudicating

> asylum claims that was intended to eliminate geographical and ideological factors from consideration.

Doherty v. I.N.S., 908 F.2d 1108, 1119 (2d Cir. 1990), *rev'd on other grounds*, 112 S. Ct. 719 (1992) (emphasis added). *See also Mason v. Brooks*, 862 F.2d 190, 194 (9th Cir. 1988); H.R. Rep. No. 608; S. Rep. No. 256, 96th Cong., 2d Sess. 1 (1980) *reprinted in* 1980 U.S.C.C.A.N. 141, 141 (the Refugee Act "places into law what we do for refugees now by custom, and on an *ad hoc* basis, through the use of the 'parole authority' in Section 212(d)(5)....").

By defendants' own admission, the process to which screened-in Haitians have been subjected is "extra-statutory," and a "third thing" nowhere authorized by either § 207 or § 208. The Rees Memorandum sets forth an *ad hoc* procedure for processing the Haitian plaintiffs that plainly violates both goals of the Refugee Act. First, it establishes a process that, by Rees' repeated admission, is *neither* § 207 nor § 208, but rather, a hybrid "third thing'" that comports with neither statutory grant of power to the INS. Well-founded fear adjudications at Guantanamo are neither refugee determinations nor asylum determinations, because Haitians who establish such claims are not brought to the U.S. as refugees under § 207 or granted asylum under § 208. Instead, the Rees Memorandum subjects the Screened In Plaintiffs to a process that lacks the benefits of both § 207 and § 208. Unlike all other § 207 applicants, Haitians at Guantanamo are detained in custody under the authority of the United States, are not free to leave or to go to a third country, are deprived of any opportunity to consult counsel or advocates, and may be forcibly repatriated by the United States. Unlike § 208 applicants, Guantanamo Haitians are deprived of all the procedural safeguards and guarantees to which they would be entitled if they were in the United States and are subjected to medical screening and HIV testing, which are not done and are not

relevant to asylum determinations. Second, the Rees Memorandum uses the parole authority as a means of circumventing § 207 and § 208, precisely the artifice Congress sought to forbid. The parole authority does not authorize the establishment of a system contrary to Congress' intent and intentionally targeted at persons who would be eligible to participate in the asylum process but for the fact that the government affirmatively interdicted them. The parole authority cannot be "employed to facilitate a continuing deprivation of [detainees'] constitutional rights." See *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1199 (9th Cir. 1975). Neither can the parole authority be employed to facilitate a continuing deprivation of detainees' statutory rights under the § 207 or § 208 processes authorized by Congress. Defendants lack the authority to establish and maintain a non-statutory system for processing "well-founded fear of persecution" claims of Haitians detained at Guantanamo.

B. Abuse of Discretion/Arbitrary and Capricious Conduct

Plaintiffs allege that the Attorney General's refusal to parole them from detention due to their HIV+ status constitutes an abuse of discretion. For the reasons set forth below, the Court agrees and sets aside her denial of parole.

The statute authorizing parole, INA § 212(d)(5), permits the Attorney General temporarily to "parole" aliens *out of detention* "for emergent reasons or for reasons deemed strictly in the public interest...." *Jean*, 472 U.S. at 855 *citing* 8 U.S.C. § 1182(d)(5)(A) (1982); *Bertrand*, 684 F.2d at 212 n.12 (2d Cir. 1982). Although the statute may not be used to circumvent the § 207 or § 208 processes, it permits the temporary release from detention of aliens with serious medical conditions. The Government's obstinate refusal to parole Haitians with HIV out of detention constitutes an abuse

of the Attorney General's discretion. *Moret v. Karn*, 746 F.2d 989, 992 (3d Cir. 1984).

The Attorney General has "broad discretionary power to parole unadmitted aliens," but she may not exercise that discretion "to discriminate invidiously against a particular race or group or to depart without rational explanation from established policies." *Bertrand*, 684 F.2d at 212 *citing Wong Wing Hang v. I.N.S.*, 360 F.2d 715, 719 (2d Cir. 1966). *See also Jean v. Nelson*, 472 U.S. at 857 (INS officials concede that parole regulations do not authorize discrimination on the basis of race and national origin). The APA, 5 U.S.C. § 706(2) (1982), authorizes this Court to "hold unlawful and set aside agency action... found to be an abuse of discretion." Because the Attorney General's parole-related discretion is limited, such decisions "may be reviewed under the judicial review provisions of the APA." *Moret v. Karn*, 746 F.2d at 991.

Courts may find that the Attorney General abused her discretion upon any of three findings: first, that she has exercised her discretion to discriminate invidiously, *Bertrand*, 684 F.2d at 212; second, that the Attorney General or her agents have deviated from their own internal regulations. *Jean*, 472 U.S. at 855-56; *Moret*, 746 F.2d at 992-93; *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 452 (S.D. Fla. 1980), *aff'd as modified, Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1041 n.48 (5th Cir. 1982); and third, that she has given "effect 'to considerations that Congress could not have intended to make relevant,'" *Doherty*, 908 F.2d at 1117-18 (citations omitted); *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1248 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

By effectively denying the plaintiffs release from detention, defendant Attorney General has abused her discretion in all three ways. First, Haitians remain in detention solely because they are

Haitian and have tested HIV-positive. The Government has admitted that the ban on the admission of aliens with communicable diseases has not been strictly enforced against every person seeking entry. Each year many "non-immigrants" enter the United States, are legally entitled to remain for years, and are not subject to HIV testing. To date, the Government has only enforced the ban against Haitians.

Second, Defendants' refusal to release plaintiffs from detention represents an unjustified deviation from established parole policy. The parole regulations, 8 C.F.R. § 212.5, with respect to individuals who do not otherwise present a security risk or a risk of absconding, expressly list factors that should guide the INS's discretion in determining whether an individual's release from detention would be "strictly in the public interest." The regulations authorize the parole of aliens with serious medical conditions out of detention for "emergent reasons." 8 C.F.R. § 212.5(a)(1). The Government cannot dispute that the Haitians' HIV+ condition constitutes a"serious medical condition." An individual who carries the virus inevitably develops AIDS and dies. To date, there is no known cure. The HIV+ Haitian detainees have been held in virtual prison camps for over eighteen months. Moreover, Defendants' refusal to release plaintiffs from detention due to their HIV status departs from the INS' own stated policy respecting release of persons who have demonstrated a credible fear of persecution, which *excludes* medical status and HIV infection from the permissible criteria for continued detention. Indeed, the *only* pertinent parole regulation explicitly provides that "serious medical conditions" constitute "emergent reasons," such that "continued detention would not be appropriate." 8 C.F.R. 212.5(a)(1). Neither the general parole regulations contained in 8 C.F.R. § 212.5, nor the specific agency guidelines pertaining to parole for asylum-seekers, authorize denying parole based on an alien's HIV status. Insofar as

defendants have deliberately bypassed the only parole regulation that applies to this situation, they have deviated from their own regulations and hence abused their discretion. *See Jean*, 472 U.S. at 856-57; *Moret*, 746 F.2d at 992-93.[7]

Finally, in invoking the HIV ban to deny the Haitian detainees parole, the Attorney General has given "effect to 'considerations that Congress could not have intended to make relevant.'" *Doherty v. I.N.S.*, 908 F.2d at 1117-8, *Volpe*, 459 F.2d at 1248). In applying 8 U.S.C.A. § 1182(a)(1)(A)(i) to deny the Haitian detainees parole, the Attorney General has misinterpreted the statute. There is no mandatory HIV exclusion for either parole (the means by which interdicted aliens who are screened in are brought to the United States in order to pursue their asylum claims) or the grant of asylum in the United States. The statute merely makes aliens with certain communicable diseases excludable from "admission" to the United States, and even the amendment to the statute which recently passed both houses of Congress adds HIV as a communicable disease.[8] The statute *does not* mandate such exclusion. Congress grants the Attorney General the power to temporarily parole out of detention aliens otherwise excludable from admission. *See* 8 U.S.C. § 1182(d). In determining whether aliens will be paroled out of detention, Congress found that the Attorney General should consider "[t]he parole of aliens who have serious medical conditions in which continued detention would not

---

7. INS regulations explicitly prohibit the exercise of parole discretion in a manner that discriminates based on race or national origin, *Jean v. Nelson*, 472 U.S. at 856. Insofar as the national origin of these asylum-seekers is a relevant factor in the government's refusal to parole plaintiffs, the government's refusal to release the Haitians from detention also represents an unjustified departure from its own policy and hence is arbitrary, capricious, and an abuse of discretion.

8. 8 H.R. Rep. No. 100, 103rd Cong., 1st Sess. 93 (1993).

be appropriate." Where HIV+ detainees have been held for nearly two years in prison camp conditions likely to further compromise their health, where each year other individuals carrying the HIV virus are allowed to enter the United States, and where the admission of the Haitians is unlikely to affect the spread of AIDS in this country,[9] the Government's continued imprisonment of the Screened In Plaintiffs serves no purpose other than to punish them for being sick. Moreover, the requested relief of release from detention is very limited, since parole out of confinement neither constitutes permanent "admission" into the United States nor otherwise "affects an alien's status," INA § 212(d)(5); *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958). Thus, after a Haitian is paroled, the government may still rely on any applicable ground to exclude that individual before choosing to confer formal "admission" into the United States. INA § 212(d)(5)(A).

The Attorney General has abused her discretion in failing to parole the HIV+ Haitian detainees on Guantanamo. Her decision to detain these Haitians deviates from established parole policy and is illegally based upon a statute which is selectively enforced against Haitian nationals and merely makes persons carrying the HIV virus excludable from "admission" or permanent residence. For the foregoing reasons, the Court hereby sets aside the Attorney General's denial of parole.

Having found the Government's "well-founded" processing to be extra-statutory and that the Attorney General abused her discretion in denying parole, the Court need not reach Plaintiffs' equal protection claim.

---

9. At trial, the Court heard testimony that the admission of the Haitian detainees will increase the AIDS population by only a fraction of one percent.

RELIEF

For the reasons stated above,

1. The following class is hereby certified:

(a) all Haitian citizens who have been or will be "screened in" who are, have been or will be detained on Guantanamo Bay Naval Base, or any other territory subject to United States jurisdiction, or on Coast Guard cutters, including those who have been or will be subject to post-screening processing (or who have resisted such processing) (hereinafter "Screened In Plaintiffs");

2. It is hereby,

(a) DECLARED that the "Well-Founded Fear" Processing by Defendants set forth in the Rees Memorandum is in excess of Defendants' statutory authority, and

(b) ORDERED that such "Well-Founded Fear" Processing be permanently enjoined, held unlawful and set aside pursuant to the Administrative Procedure Act; and

(3) It is hereby further

(a) DECLARED that defendant Attorney General's exercise of the statutory parole power under INA § 212(d)(5) to deny Screened In Plaintiffs parole out of detention constitutes an abuse of discretion; and

(b) ORDERED that defendant Attorney General's exercise of the statutory parole power under INA § 212(d)(5) to deny Screened In Plaintiffs parole out of detention be permanently enjoined, held unlawful and set aside pursuant to the Administrative Procedure Act; and

4. It is hereby further

(a) DECLARED that the "Well-Founded Fear" Processing, Disciplinary Proceedings, Arbitrary and Indefinite Detention, Medical Care and Camp Conditions to which Screened In Plaintiffs are being subjected by Defendants denies those plaintiffs Due Process of Law; and

(b) ORDERED that such "Well-Founded Fear" Processing, Disciplinary Proceedings, Arbitrary and Indefinite Detention, Medical Care and Camp Conditions be permanently enjoined pursuant to the Fifth Amendment of the United States Constitution; and that Screened In Plaintiffs be immediately released (to anywhere but Haiti) from such processing, proceedings, detention, medical care and camp conditions; and

(5) It is hereby further

(a) DECLARED that denying plaintiff Haitian Service Organizations immediate access to Guantanamo to communicate and associate with their detained Screened In Plaintiff clients violates the First Amendment; and

(b) ORDERED that Defendants are permanently enjoined from denying plaintiff Haitian Service Organizations immediate access at Guantanamo, on Coast Guard Cutters, or at any other place subject to U.S. jurisdiction to any member of the class of Screened In Plaintiffs (regardless of whether any such screened-in plaintiff has been furnished with an exact date and time for an interview), subject to reasonable time, place, and manner limitations for the purpose of providing class members legal counsel, advocacy, and representation; and

(6) It is hereby finally

(h) DECLARED that Plaintiffs are entitled to such other and further relief as the Court may deem just and proper, including reasonable attorneys' fees and costs, to be determined at a future hearing.

So ordered.

Sterling Johnson, Jr.
United States District Judge

Dated: Brooklyn, New York
June 8, 1993

Supreme Court, U.S.
FILED
JUN 17 1993
OFFICE OF THE CLERK

No. 92-528

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-528

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

---

1. In the pending certiorari petition, we seek review of the June 10, 1992, judgment of the court of appeals that affirms, as modified, the preliminary injunction entered by the district court. As modified, that injunction barred petitioners from reinterviewing or repatriating "screened-in" interdictees at the U.S. Naval Base at Guantanamo Bay, Cuba, without first affording them access to counsel. Pet. App. 162a, 117a-118a.[1]

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *Sale, Acting Commissioner, Immigration and Naturalization Service, et al.* v. *Haitian Centers Council, Inc., et al.*, No. 92-344 (argued Mar. 2, 1993).

In our pending certiorari petition, we argue (1) that respondents' claims are barred under the doctrine of collateral estoppel (Pet. 22-26), and (2) that the Second Circuit in any event erred in sustaining the preliminary injunction on the basis of the Due Process Clause (Pet. 15-22). We suggest (Pet. 26-30) that the Court grant the petition and summarily reverse the due process ruling, or, in the alternative, that it hold the petition and dispose of it as appropriate in light of its decision in *Sale, Acting Commissioner, Immigration and Naturalization Service, et al.* v. *Haitian Centers Council, Inc., et al.*, No. 92-344 (argued Mar. 2, 1993).

On June 8, 1993, the district court entered a further order in the case, again relying on the Due Process Clause, as well as other grounds. Resp. Supp. Br. App. 1-44.[2] The June 8 order includes permanent injunctive relief that, *inter alia*, bars petitioners (1) from conducting, in accordance with the Rees Memorandum of February 29, 1992 (see Pet. 6-8), further interviews of "screened-in" interdictees at Guantanamo, in any other territory subject to the jurisdiction of the United States, or on Coast Guard cutters, and (2) from denying the plaintiff Haitian Service Organizations immediate access to any member of the class of screened-in plaintiffs at Guantanamo, on Coast Guard cutters, or at any other place subject to the jurisdiction of the United States. The order also directs that screened-in plaintiffs be immediately released (to anywhere but Haiti) from detention at Guantanamo. Resp. Supp. Br. App. 42-44. The government has decided not to seek a stay of that order

[2] We previously furnished the Court with copies of the June 8 order.

as it applies to the screened-in migrants remaining at Guantanamo, and instead to bring those migrants to the United States. No decision has yet been made concerning an appeal of the permanent injunctive relief or other aspects of the June 8 order.

2. On June 11, 1993, respondents filed a supplemental brief in this Court, stating that the entry of the June 8 order dissolves the preliminary injunction and renders proceedings on appeal of that injunction moot. Respondents argue that the Court should therefore deny our pending certiorari petition seeking review of the Second Circuit's affirmance of the preliminary injunction.

We agree that the preliminary injunction now is moot. As we stated in our reply brief (at 10), however, the proper disposition in the event of mootness is not to deny the petition, but rather to grant the petition and vacate the judgment of the court of appeals as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981).

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the court of appeals entered June 10, 1992, should be vacated as moot.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General[*]

JUNE 1993

---

[*] The Solicitor General is disqualified in this case.

FILED
MAR 24 1993
OFFICE OF THE CL

No. 92-528

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 2
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 3
Haitian Refugee Center v. *Baker*:
949 F.2d 1109 (11th Cir. 1991) 6
953 F.2d 1498 (11th Cir. 1992) 6
Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 5
Landon v. *Plasencia*, 459 U.S. 21 (1982) 2
Reid v. *Covert*, 354 U.S. 1 (1957) 3
Sale v. *Haitian Centers Council, Inc.*, No. 92-344 (argued Mar. 2, 1993) 1, 10
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953) 5
United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 8
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) . 10
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) . 3, 5

Constitution, statutes and regulations:

U.S. Const.:
Amend. I 6
Amend. V (Due Process Clause) 3, 5, 6, 9, 10
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1226-1227 4
8 U.S.C. 1253(h) 7, 9
Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1991) 4, 8
U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150 7
Art. 33 ..... 7, 9
Art. 33.1 7

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-528

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

After our petition for writ of certiorari in the present case was filed, this Court granted our certiorari petition in *Sale* v. *Haitian Centers Council, Inc.*, No. 92-344, which arises out of the same underlying lawsuit as the instant petition and concerns the President's authority to authorize direct repatriation of interdicted migrants. No. 92-344 has been fully briefed and was argued on March 2, 1993. We continue to believe that the due process ruling of the Second Circuit in the instant case is so clearly incorrect that summary reversal is appropriate. In the alternative, however, we request the Court to hold the certiorari petition pending the Court's decision in No. 92-344.

1. The ruling at issue concerns the constitutional rights of aliens outside the United States to secure procedural protections that were not afforded by Congress: here, a claimed right to consult with counsel concerning their efforts to come to the United States and to avoid repatriation to Haiti. In defending the decision of the

Second Circuit, respondents do not question the well-established general principle that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative," *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). Rather, respondents adopt the Second Circuit's arguments that the present case is "unique" (Br. in Opp. 17), because (a) the respondent migrants here have been "screened in" as possessing a plausible claim of refugee status, and (b) they are held at Guantanamo Bay Naval Base, an area within the exclusive control of the United States government. See *id.* at 18-19. Respondents argue, in addition, that they seek only to avoid repatriation to Haiti and that prior decisions regarding the absence of constitutional rights on the part of aliens seeking admission to the United States are inapposite. See *id.* at 20-21. These factors, however, provide no basis for distinguishing the long line of precedent holding that aliens challenging immigration decisions have no constitutional rights to procedural protections that have not been afforded by Congress.

a. Respondents, like the Second Circuit, have entirely failed to explain how the INS's initial screening decision altered the *legal status* of the affected migrants or conferred a constitutionally protected liberty interest where none previously existed. The use of a two-step screening process was purely an internal management practice on the part of the INS; the decision to screen in a migrant did not reflect even a tentative conclusion that the individual was in fact a refugee, nor did it create a presumption of refugee status. By way of analogy, it is well established that an individual has no constitutionally protected liberty or property interest in obtaining public employment. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 575, 578 (1972). And it is surely not unusual for federal hiring officials to extend interviews only to a subset of the

applicant pool consisting of individuals who are thought to merit particularly serious consideration. Under the Second Circuit's reasoning, however, an applicant who is "screened in" to the pool that will be afforded interviews may thereby acquire a liberty or property interest in obtaining the federal job, entitling a federal court to determine what procedures are appropriate at subsequent stages of the selection process. More generally, the Second Circuit's reasoning suggests that an individual who has no liberty or property interest in a government benefit may acquire such an interest simply by passing some threshold standard of potential eligibility. Such a holding simply circumvents established due process jurisprudence.

b. In *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), this Court noted that in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), it had emphatically "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." There is no basis for respondents' suggestion that the United States government's physical dominion over the Guantanamo Bay Naval Base transforms foreign soil into "sovereign territory," so as to trigger the protections of the Bill of Rights. *Reid* v. *Covert*, 354 U.S. 1 (1957), relied upon by respondents (Br. in Opp. 21, 22), involved the trial of an American citizen stationed at an American military base in England; yet the plurality (while holding that Mrs. Covert, as a *citizen*, was entitled to constitutional protections) quite plainly approached the case as one involving the *extraterritorial* application of American law. 354 U.S. at 5-6 (opinion of Black, J.); see also *Verdugo-Urquidez*, 494 U.S. at 269-270 (discussing *Reid*).[1]

---

[1] Moreover, as we have explained in our certiorari petition (at 17-18), the rule that aliens have no constitutional rights in connection with their efforts to obtain initial entry into this country applies even when

c. Nor is there merit to respondents' argument that cases rejecting the constitutional claims of aliens seeking admission to this country are inapposite to migrants who seek to avoid repatriation to Haiti. The United States government has stated repeatedly that it will transport interdicted Haitians to any third country that is willing to accept them. Absent such offers from third countries, however, the decision to deny interdicted migrants entry into the United States cannot be meaningfully distinguished from the decision to repatriate them to Haiti. Moreover, Executive Order No. 12,324, under which the migrants now at Guantanamo were interdicted, authorized interdiction (and subsequent repatriation) only "when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist." Pet. App. 265a.[2] The repatriation of Haitians interdicted under that Executive Order was thus inextricably intertwined with the United States' efforts to control the circumstances under which Haitian migrants will be permitted to enter this country.

The distinction drawn by respondents also finds no support in this Court's cases. For example, respondents' argument would necessarily mean that aliens in exclusion proceedings in the United States would have constitutional rights to challenge the manner in which the Attorney General designated the country to which they will be sent—a necessary part of the exclusion process—even though they have no constitutional rights to challenge the procedures used to determine their eligibility for admission. Yet both decisions are an integral part of a single exclusion proceeding, see 8 U.S.C. 1226-1227, and this Court has definitively held that such

---

aliens are detained *on U.S. soil* pending a determination as to their eligibility for admission.

[2] Hereinafter, "Pet. App." refers to the appendix to the petition for certiorari in No. 92-344.

proceedings are not governed by the strictures of the Due Process Clause. See, *e.g.*, *Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950). Similarly, in *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1953), this Court held that an excluded alien did not acquire procedural due process rights by virtue of the fact that he was indefinitely "stranded" in U.S. custody on Ellis Island "because other countries [would] not take him back." 345 U.S. at 207. As in *Mezei*, respondents simply have no constitutional rights to challenge the manner in which the United States seeks to effectuate a bar to their entry—whether that bar is achieved by providing "temporary harborage," 345 U.S. at 215, on Ellis Island (or Guantanamo), or by transporting the alien to the territory of another nation.

Finally, to the extent respondents contend that they do not seek entry into the United States, that contention serves only to further attenuate their nexus to this country and their claim to special protections under our Constitution. And as noted above, this Court recently reiterated in *Verdugo-Urquidez* its "emphatic" "rejection of extraterritorial application of the Fifth Amendment" in *Johnson* v. *Eisentrager* to aliens with respect to matters arising outside the United States, see 494 U.S. at 269, not merely to their attempted entry into the United States.[3]

---

[3] Contrary to respondents' suggestion (Br. in Opp. 22), the Chief Justice's opinion in *Verdugo-Urquidez* commanded a majority of the Court. Although Justice Kennedy filed a concurring opinion, he expressly joined the opinion of the Court, 494 U.S. at 275, and endorsed what he termed the "persuasive justifications" for the result it reached, *id.* at 278, while adding several others of his own. In fact, Justice Kennedy emphasized the importance of the distinction between aliens and citizens with respect to the extraterritorial application of the Constitution, see *id.* at 275, and found the Fourth Amendment inapplicable there even though the alien was physically present in the United States, *id.* at 278. Nowhere did Justice Kennedy suggest that the Fifth Amendment would apply to immigration matters concerning an alien outside the United States.

2. If this Court decides not to summarily reverse the decision at this time, we believe it is appropriate to hold the petition pending the Court's disposition of No. 92-344. In several important respects, the decision in No. 92-344 may further demonstrate that the Second Circuit plainly erred in this case. See Pet. 28-29.

a. In both the present case and No. 92-344, the government has argued that the plaintiffs' claims are barred by collateral estoppel, based on the Eleventh Circuit's decisions in *Haitian Refugee Center (HRC)* v. *Baker*.[4] The Second Circuit in the present case gave two reasons for rejecting the government's position. It held (1) that the plaintiff class in *HRC* was composed of "screened out" migrants whose lawsuit could not bind the "screened in" plaintiffs in the present case, Pet. App. 93a-96a, and (2) that changes in INS policy since the culmination of *HRC*

Respondents argue (Br. in Opp. 15) that review should be denied because six claims are now the subject of the trial in the district court, while only one of these claims—the due process right to counsel—is presented here. In fact, however, four of the six claims respondents identify (Br. in Opp. 6-7 n.6) rest on the Due Process Clause, and therefore would be disposed of if this Court were to hold on the instant petition that the Due Process Clause does not apply to aliens outside the United States with respect to extraterritorial matters. The remaining constitutional claim pending in the district court is asserted not by the Haitian migrants, but by Haitian service organizations, who claim a First Amendment right of access to Guantanamo. That claim is without merit, and it would not in any event support an injunction barring repatriation of Haitian migrants until personnel from the Haitian service organizations have exercised their supposed First Amendment rights. The sixth claim cited by respondent (Br. in Opp. 15) is statutory—an APA claim that it was arbitrary and capricious to reinterview the "screened in" Haitians. That claim is precluded for the reasons stated in our brief in No. 92-344 (at 13-18) and is, in any event, frivolous in view of the current medical exclusion of HIV positive aliens.

[4] The Eleventh Circuit's opinions (Pet. App. 171a-189a, 190a-252a) are reported at 949 F.2d 1109 (1991) and 953 F.2d 1498 (1992), respectively.

rendered collateral estoppel inapplicable, Pet. App. 96a. Respondents in No. 92-344 resist the application of collateral estoppel on essentially the same grounds. Thus, they argue that "[t]he 'screened-out' and 'screened-in' Haitians neither shared the same interest in challenging screening nor suffered the same injury from it" (92-344 Resp. Br. 43; see generally *id.* at 41-45), and that changes in circumstances since the *HRC* litigation would make it "inequitable" for *HRC* to be given preclusive effect (92-344 Resp. Br. 47-49). It is therefore likely that this Court's resolution of the collateral estoppel issue in No. 92-344 will bear directly on the correctness of the Second Circuit's holding in the present case.

b. In holding that respondents in the present case had demonstrated the presence of sufficiently serious legal questions to warrant a preliminary injunction, the Second Circuit relied in part on its conclusion that

> "[s]creening in" a Haitian alien implicates the Agreement Between the United States and Haiti, the Refugee Act of 1980, the Executive Order and the Protocol, to which we are a signatory. These affirmative actions by the Executive Branch and Congress can fairly be said to have established a reasonable expectation by the "screened in" plaintiffs in not being wrongly repatriated; we believe this expectation to be protected by the due process clause.

Pet. App. 112a-113a. Implicit in the court's analysis is the assumption that the Refugee Act of 1980 (or, more specifically, 8 U.S.C. 1253(h)) and the Protocol confer rights of non-repatriation upon refugees who have not reached the United States. In No. 92-344, however, we argue that neither Section 1253(h) nor Article 33 of the U.N. Convention Relating to the Status of Refugees[5] restricts

---

[5] The United States acceded to Article 33.1 of the Convention by ratifying the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

the activities of U.S. officials outside the United States. See 92-344 Gov't Br. 27-55. Rather, in our view, the Act and Convention prohibit the U.S. government from repatriating only those refugees who are physically present in the United States and can demonstrate a threat of persecution. Acceptance of that position by this Court in No. 92-344 would severely undermine the Second Circuit's conclusion that the plaintiffs in the present case—who have never reached the United States but instead are housed at an American military base on hostile foreign soil —possess a liberty interest in avoiding repatriation to Haiti. We likewise argue in our reply brief in No. 92-344 (at 29-30)—in answering the reliance by the respondents there on the 1981 Agreement between Haiti and the United States—that the Agreement is merely a law enforcement agreement between two governments and does not confer any private rights on individual Haitian migrants that are judicially enforceable in U.S. courts. If the Court so holds, that basis cited by the Second Circuit for finding that the respondents here have a protected liberty interest would likewise be eliminated.[6]

3. Respondents contend that, even if the issues in this case are substantially related to those in No. 92-344, the petition should be denied rather than held because (a) the decision under review is interlocutory, and (b) trial of this case is currently ongoing in the district court. In the circumstances of this litigation, those arguments in fact counsel in favor of summary reversal, not a denial of certiorari.

a. The interlocutory character of an appellate decision is certainly relevant to the question whether a case

---

[6] The remaining source of a liberty interest cited by the Second Circuit was Executive Order No. 12,324. See Pet. App. 112a-113a. However, as we have pointed out (Pet. 20 & n.14), that Executive Order has been rescinded, and therefore could no longer be a source of a liberty interest, and it did not confer any judicially enforceable rights when it was in effect.

warrants plenary review by this Court. See Br. in Opp. 13-14 (citing *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)). But here, the preliminary injunction affirmed by the Second Circuit clearly conflicts with prior Due Process rulings of this Court concerning the rights of aliens outside the United States; unquestionably restricts the President's options for responding to the Haitian migrant crisis (see Pet. 27); and necessitates ongoing disruptive litigation of issues that were already adjudicated and decided in the government's favor in *HRC* v. *Baker*, *supra*. Under these circumstances, summary reversal is certainly warranted. In any event, respondents identify no reason why the interlocutory posture of the decision below should induce this Court to deny the petition, rather than to hold it pending resolution of No. 92-344. Nor is there any reason why the Court should refrain from granting review and reversing or vacating the decision below in light of its decision in No. 92-344, if that decision casts still further doubt upon the Second Circuit's disposition of the instant case.[7]

b. The pendency of an ongoing trial in the district court also provides no basis for denying the petition at the present time. The fact that the trial is currently ongoing makes clear that the proceedings on remand are not being held in abeyance pending this Court's disposition of the petition for certiorari, and that holding the petition will not delay the ultimate resolution of the lawsuit. Further,

---

[7] If the Court holds in No. 92-344 that judicial review is precluded —and therefore does not rule in that case on the extraterritorial application of Section 1253(h) (and Article 33)—it could choose to address the latter issues (which have been fully briefed) by granting certiorari and deciding the instant case at the same time it renders its decision in No. 92-344. It could then hold in the instant case that neither Section 1253(h) nor Article 33 affords rights to the respondent migrants that could give rise to a liberty interest protected by the Due Process Clause, as the Second Circuit held. Alternatively, the Court could simply hold that the Due Process Clause is altogether inapplicable in this setting.

summary reversal could expedite—not delay—the ultimate disposition of these proceedings.

It is possible, of course, that future events in the district court might have a bearing on this Court's ultimate disposition of the instant petition, and for that reason we will apprise this Court of relevant developments in the district court proceedings. It is clear, however, that at least for now the preliminary injunction ordered by the Second Circuit continues to impose substantial legal disabilities upon the government. The mere *possibility* that this case may become moot prior to the resolution of No. 92-344 provides no basis for denial of our petition at the present time. And, if the Second Circuit's affirmance of the preliminary injunction at issue here should later become moot prior to the Court's disposition of the petition for certiorari, the proper course would be to vacate the decision of the Second Circuit, not to deny the petition. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

* * * * *

The Court should grant the petition as to question 1 and summarily reverse the judgment below, on the ground that Haitian interdictees outside the United States have no rights under the Due Process Clause in connection with their efforts to enter the United States or other matters arising outside the United States. In the alternative, the Court should hold the petition pending the disposition of *Sale* v. *Haitian Centers Council, Inc.*, No. 92-344 (argued March 2, 1993).

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

MARCH 1993